

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

77-1478, 1479

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee.*

vs.

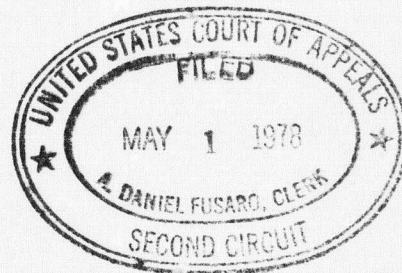
DANIEL LEE RUCKER and EUGENE C. SMITH,
Defendants-Appellants.

On Appeal from a Judgment of Conviction in The United
States District Court for Western District of New York
At 76-181

APPENDIX FOR APPELLEE,
THE UNITED STATES OF AMERICA

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Government's Trial Memorandum.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	CR. NO. 76-181
	:	
Plaintiff	:	
	:	
- vs -	:	<u>GOVERNMENT'S TRIAL</u>
	:	
DANIEL LEE RUCKER and	:	<u>MEMORANDUM</u>
EUGENE SMITH,	:	
	:	
Defendants	:	
	:	

The Defendant Rucker is charged in Count I with entry into the Marine Midland Bank, 1500 Hudson Avenue, with intent to rob that bank on May 14, 1976, in violation of 18 U.S.C. §2113(a) and §2. The Government will prove that one Roberto Rivera actually entered the bank on that date with intent to rob it with the specific aid, counsel, inducement and procurement of the Defendant Rucker who convinced Rivera to enter the bank.

The Defendants Smith and Rucker are charged in Count II with entry of the First National Bank, Georgetown Plaza Branch, with intent to rob that bank on September 29, 1976, in violation of 18 U.S.C. §§2113(a) and 2. The Government intends to prove that Smith and Rucker did not enter the bank, but rather caused one Edward Lee Brown to actually enter and rob that bank and deliver some of the bank robbery proceeds to Smith and Rucker. Therefore, the Government will request jury instructions on entry with intent to commit the bank robbery, as well as instructions

* * * * *

Government's Trial Memorandum.

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The Government intends to offer as part of its case in chief a certified and exemplified copy of the indictment and conviction of the Defendant Daniel Rucker for his involvement in the January, 1-76 robbery of the Marine Midland Bank, 1500 Hudson Avenue. That copy of the indictment and conviction is under seal of Monroe County. The Government is attaching to this memorandum photocopies of the self-authenticating documents which the Government intends to offer into evidence. The Government submits that these documents are admissible under Rule 404(b) and Rule 902(1) of the Federal Rules of Evidence, as well as the Rule 27 F.R.Cr.P. and Rule 44 F.R.Civ.P. More particularly, it is not anticipated that the defense will object to the authenticity of this record, but rather will object that its probative value is outweighed by its prejudicial value. The Government's position is that this evidence of Rucker's commission of an identical offense within months of the charged offense is highly probative.

In the Second Circuit the rule has been stated in its inclusory form, that is, evidence of other crimes is admissible except when offered solely to prove criminal character. United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967), see also United States v. Campanile, 516 F.2d 288 (2d Cir. 1975). The Government offers this to prove, among other things, that the Defendant Rucker had the motive to send in other people to rob

Government's Trial Memorandum.

- 5 -

these banks because he knew that the police had a record of him robbing this particular bank and that he would be recognized and identified by people in the bank, once the police showed his photograph to them. In addition, it is admissible to show his intent and knowledge. Also it is highly probative of his plan or design, see for example United States v. Campanile, 516 F.2d 288, 292 (2d Cr. 1975). This will be one of four different times when the Defendant Rucker has sent other people in to rob banks. The method of operation of this prior crime is so similar to the charged crimes that evidence of this prior crime is admissible to establish the identity of Rucker as the aider and abettor of these charged crimes.

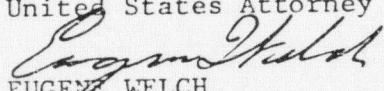
The Government will request that the Court give a precautionary instruction to the jury when this is admitted into evidence, instructing the jury that they may only consider this as to motive, intent, preparation, plan, knowledge and identity, and then only as to the Defendant Rucker.

Dated: Rochester, New York, October 21, 1977.

Respectfully submitted,

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By:


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Excerpts of Proceedings, dated 10-17-77.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

-against- :

DANIEL LEE RUCKER and :
EUGENE SMITH. :

Defendants. :

-----x

CR 76-191

United States Courthouse

October 17, 1977

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

CHERY
ACTING OFFICIAL REPORTER

A5

Discussion.

* * * * *

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MR. LARIMER: My name is David G. Larimer.

I represent the defendant Daniel Rucker.

This case previously was before Judge Berke on September 26th. At that time both Mr. Wolford and I relayed to the Court our various scheduling problems. Mr. Wolford I believe has a trial this week and I have a rather substantial trial commencing on November 1st that has been partially tried and set for a date certain. It's about a month of preparation and will continue to involve more preparation.

In light of that, Judge Berke set this down for trial on November 22nd. I have great difficulty going forward either this week or next week and would request that we keep the trial set for the date scheduled November 22nd.

In addition, I realize this puts me in a peculiar posture because on September 26th when we appeared before Judge Berke I did indicate that since this case was indicted in September of 1976, I thought at that time there had been a violation of the Speedy Trial Act and also the Western District Plan for prompt disposition of the criminal cases, to indicate at that time that I would file motions to dismiss. Since I believed this case would come up for trial in November I anticipated my motions

being returned on the first motion date in November. Those are my problems for requesting an adjournment on November 22nd, not so much that an adjournment was set and we keep that date --

THE COURT: It sounds like you're both available to try this case. Maybe not this week, but next week.

MR. WOLFORD: I would not be available this week. I talked to Judge Curtin regarding this case. I did say I did not have any commitment next week.

THE COURT: I think we better go ahead with it. Pick a jury. Can you pick a jury this morning because we have a panel here? I don't want to hold them here physically, but tell them to come back next Monday and start it then.

MR. LARIMER: My commitments are I did plan to be out of town the first two weeks next week preparing that case that I have to start November 1st. And I do have a short trial beginning on Wednesday the 26th I believe.

THE COURT: You will have to go out of town this week and I will give you a certificate of engagement so you will be covered for your 26 date. I think we better pick a jury in this case and if we don't start today we will start next week. We will not swear the jury, but just pick them and then tell

to come back.

MR. HOULIHAN: That will be agreeable to the Government, especially in light of the defendants' representation that they were denied the Speedy Trial Act. I think that a prompt disposition of the case is indicated.

MR. WOLFORD: The Monday is listed on the calendar as a Federal holiday. Is that to be answered here or not? I am just wondering.

THE COURT: I am here, you are all here. If you want to take advantage of the holiday I suppose we could start on Tuesday, but you want to get finished.

MR. LARIMER: Yes, I do.

THE COURT: I don't see any reason why we can't go on Monday.

MR. LARIMER: Perhaps on Monday I would like to orally argue my motion to dismiss before the Court.

THE COURT: Okay.

MR. LARIMER: Thank you.

(At this point there is a short recess and now this is the afternoon session.)

THE COURT: Gentlemen, before we actually start to begin would you step up here, please. If we pick the jury today I have got the balance of the week. Who has the engagement?

MR. WOLFORD: I have an engagement day certain now for a month and a half. I told Judge Berke that and that is why I set the date.

THE COURT: What would happen if I gave you a certificate of engagement?

MR. WOLFORD: Well, let me explain to you what it is. It is an arbitration hearing involving a multi-million dollar contract claim. It has been going on now for approximately three months. There are three days set for hearings this week the 19th, 20th and 21st with witnesses from New Mexico and elsewhere and three arbitrators and six other attorneys. I simply could not --

THE COURT: Well, all right. We will begin on Monday.

MR. LARIMER: It is all right with me. Monday is fine.

THE COURT: So, we will get through during the week.

MR. LARIMER: I would prefer to start on Monday than Tuesday.

THE COURT: We will pick a jury and swear them in and let all the others go. I have not been honored with any other jury cases.

MR. LARIMER: The Court ask all the questions?

* * * * *

first four rounds you have you can divide those and then you can flip as to who gets the last and next to last. You get two, two, two and one, one, one and one, one, one.

MR. WOLFORD: Well, in other words we don't exercise say that challenge on the first round. We wait it I take it.

THE COURT: That is right.

MR. LARIMER: Objection to challenging people who sit on the panel --

THE COURT: You can challenge anybody on the panel at any time in the box.

MR. WOLFORD: We will either exercise or waive it, but when a piece?

THE COURT: Right, and the next to last you have to flip a coin.

MR. WELCH: The Government is ready.

MR. WOLFORD: The defendant Smith is ready.

MR. LARIMER: The defendant Rucker is ready.

(At this point the jury selection begins.)

THE COURT: Now, ladies and gentlemen, those of you who were here this morning heard a lot about what I am about to say, but I must repeat it again for this case. So, if it sounds a little repetitious, you just have to bear with us.

This too, is a criminal case. It is brought on by means of an indictment. An indictment, as I explained to you this morning is nothing but a charge. It is not evidence or proof of any kind in the case. The defendants enjoy a presumption of innocence and that presumption of innocence remains with them throughout the trial. Keep in mind that in any criminal case, including this one, the burden is always upon the Government to prove its case beyond a reasonable doubt. That burden never shifts to the defendant. There is no burden or obligation or anything of that kind, there is no requirement in any way that defendant produce any kind of evidence in a criminal case.

Now, I am going to read the indictment to you. Of course, it is not the same indictment you heard this morning. It is a different indictment. It involved a different charge. I will read it to you so you will understand the nature of the case. Keep in mind it is not proof or evidence of any kind. The indictment in this case is entitled the United States of America against Daniel Lee Rucker and Eugene Smith. Count one reads as follows:

Count one reads as follows:

"On or about May 14, 1976, in the Western District of New York Daniel Lee Rucker, did enter the Marine Midland Bank, 1500 Hudson Avenue, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit a felony affecting that bank, that is, the taking by force and by violence and by intimidation in the presence of the employees of the bank, money belonging to and in the care, custody control, management and possession of the bank, all in violation of Title 18, United States Code, Section 2113(a) and Section 2."

Count II charges that:

"On or about September 29, 1976, Eugene Smith and Daniel Lee Rucker did enter the First National Bank, Georgetown Plaza Branch, the deposits of which were then insured by the Federal Deposit Insurance Corporation, with intent to commit a felony affecting such bank, that is, the taking by force and by violence and by intimidation from the presence of employees of such bank money belonging to and in the care, custody, control, management and possession of the bank, all in violation of Title 18, United States Code, Section 2113(a) and Section 2."

Count III is the conspiracy count and it

reads as follows:

"From on or about May 8, 1976, and continuously thereafter up to and including the date of the filing of this indictment in the Western District of New York, Daniel Lee Rucker, the defendant, wilfully and knowingly did combine, conspire, confederate and agree with Roberto Louis Rivera, named herein as co-conspirator but as a co-defendant and with diverse other persons to the Grand Jury unknown, to commit the following offense against the United States, to wit, a violation of Title 18, United States Code, Section 2113, to wilfully and knowingly enter the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York, and by force and violence and by intimidation take from the employees of that bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, a sum of money belonging to and in the care, custody, control, management and possession of that bank, all in violation of Title 18, United States Code, Section 371.

"In furtherance of the conspiracy and to effect the object thereof, the defendant performed the following acts:

"1. On or about May 12, 1976, Daniel Lee Rucker had a conversation with Roberto Louis Rivera,

Court's Reading of Indictment.

"2. On or about May 12, 1976, Roberto Louis Rivera entered the Marine Midland Bank, located at 1500 Hudson Avenue, Rochester, New York.

"3. On or about May 14, 1976, Daniel Lee Rucker had a conversation with Roberto Louis Rivera.

"4 On or about May 14, 1976, Roberto Louis Rivera entered the Marine Midland Bank, 1500 Hudson Avenue, Rochester, New York."

Count four charges a conspiracy between the defendants Daniel Lee Rucker and Eugene Smith reads as follows:

"On or about September 29, 1976, and continuously thereafter up to and including the date of the filing of this indictment in the Western District of New York, Daniel Lee Rucker and Eugene Smith the defendants, wilfully and knowingly did combine, conspire and confederate and agree with each other and with Edward Lee Brown, named herein as a co-conspirator but not as a co-defendant, and with diverse other persons to the Grand Jury unknown, to commit the following offense against the United States to wit: a violation of Title 18, United States Code, Section 2113, to wilfully and knowingly enter the First National Bank, Georgetown Plaza Branch and by force and violence and by intimidation take from the employees of that bank, the

deposits of which were then insured by the Federal Deposit Insurance Corporation, a sum of money belonging to the care, custody, control, management and possession of the bank, all in violation of Title 18, United States Code, Section 371.

"In furtherance of the conspiracy and to effect the object thereof, the defendant performed the following acts:

"On or about September 29, 1976, Daniel Lee Rucker, Eugene C. Smith and Edward Lee Brown had a conversation.

"On or about September 29, 1976, Edward Lee Brown did enter the First National Bank, Georgetown Plaza Branch .

"On or about September 29, 1976, Daniel Lee Rucker and Eugene C. Smith each had a conversation with Edward Lee Brown in the Gold Circle Store, near the First National Bank, Georgetown Plaza Branch."

Those are the four counts of the indictment. Again, they are not proof or evidence of any kind. Now, listen again to the questions that I ask the jurors in the box because it may come your turn to serve as jurors and there is no need to repeat them again unless we have to. We will try not to. Let me say this to all of the jurors. At the outset the present plan is to select a jury today and have you return a week from today on October 24th, Monday, October 24th at 10 o'clock A.M. to commence the trial. That is because of the commitments of various attorneys with other cases that have to be met. But rather than impanel a whole new jury and bring you all back Monday we will select the jury today and then start the trial next Monday.

(At this point the jury selection begins.)

THE COURT: Now, ladies and gentlemen, I am going to give you some brief preliminary instructions. Let me begin by saying that I told you right at the outset, that we're not going to sit during this week because of one or more prior engagements of the attorneys involved in this case and Judge Berke has already indicated to them that they could have this week off. So, you will be instructed to return here next Monday morning at 9:45 A.M.

* * * * *

UNITED STATES OF AMERICA, :
 :
 -against- : CR 76-181
 :
 DANIEL LEE RUCKER and :
 EUGENE SMITH, :
 :
 Defendants.

United States Courthouse

October 24, 1977

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

CHERYL FREY
ACTING OFFICIAL COURT REPORTER

* * * * *

THE COURT: Gentlemen, I guess the first order of business is the motions you made.

MR. WELCH: Before any argument on that motion, if I might for the record correct a serious but stupid blunder on our response order papers to Mr. Rucker's motion, speedy trial motion. For some strange reason your Honor the Government calculated the first 180 days to expire in August rather than June 6, 1977. That was inadvertent. We did not intend to mislead the Court and we would therefore have to withdraw the first part of our argument that said the 180 days had not been expired.

THE COURT: Well, I spotted it fairly quickly. If you had intended to mislead me you were not successful in the event. It struck me that that August date did not look right when I first looked at it. So, you did not mislead me. I read the papers. The way I analyze the time beginning with the defendant Rucker, there are two possible interpretations of the excludable period as I see it, but either interpretation as I see it the Government has complied with Section 11C and 7B1 of the Western District plan which, of course, is the only provision or the only provisions which provide for the movement for mandatory dismissal.

The way that I would normally if I were sitting in the Eastern District of New York, I probably would have -- I don't know how Judge Burke has handled the calendar, but the way I normally would have interpreted the exclusion would be roughly as follows:

I would have allowed a three day exclusion from the date of arraignment, from the date of appointment of counselor for the defendants. I would have allowed a 36 day exclusion from the time when the motion in my opinion should have been made. That was made namely ten days after the case was assigned. It should have been made on December the 19th. And since it was returnable on January the 24th I would have allowed 36 days excludable time for the hearing on the motion under 3161H1E.

The Government contends and as far as I can see that there was no dispute with respect to this. There was an extra time for reply which would have added another seven days and 30 days for the motion time, for the motion under advisement or for a total of 76 days. If 76 days are added to the June 2nd date, which I think is the approximate date of the 180 days from indictment, then you come to August 17th. The Government moved the case for trial on July the 11th by motion made on or about June 28th. So, the

Government presumably was ready certainly no later than July 11th and so indicated and possibly as early as June 28th. I don't have a copy of the Government's motion papers. I can't tell whether they announced in their June 28th motion papers if they were ready or not.

MR. WELCH: May I give to the Court a copy of the motion papers.

THE COURT: I couldn't lay my hands on them, but I might like to look at them. Did you make any statement in your papers?

MR. WELCH: Yes, your Honor. The motion itself says the United States Attorney by Assistant Gerald G. Houlihan, states the United States Attorney is ready for trial on this action and moves this Court to set a date for trial on this action.

THE COURT: What is the date on that?

MR. WELCH: It is an identical motion. The first one was the one filed June 28, 1977, returnable July 11, 1977. The second one was filed September 16th.

THE COURT: Well, the important date then would be the date on which the Government said that it was ready for trial. As I see it, if it were served on June 28th, that would be sufficient. Under the minimum deductible period, I suppose it could be

argued that the three days should not be excluded, though I don't see why. Certainly that is for the benefit of the defendants.

Secondly, a defendant could argue that the Court may not have prescribed a ten day period within which to make motions and so that he could take any amount of time he saw fit. The difficulty I had with that the reason why I would be inclined to put to it, adopt the maximum number is that if given that rule the defendant could make his motion right up towards the end of, right close to the end of June and achieve the effect that really puts the Government and the Court and everybody else in a very difficult situation. I think the normal rule is the motion should be made promptly and I think the reasonable time is ten days. But even assuming we take the three days out and take the case of Rucker the January 6th through January 24th, that is an 18 day period. The motion was made on January 6th and returnable on January 24th. Under the rules he could have made it as short as five days. He could make the motion on five days' notice. He chose 18 days. So, that 18 days is definitely excludable. The extra time for reply is seven days and motion under advisement is 30 days. That gives you a total

Discussion on Motions.

on my calculation of 55 days. You add the 55 days to June 2nd and you get a July 27th date. So, the Government was ready either on June 28th or July 11th and well within the period. And again, the Government has complied with the Section 7B1 and Section 11C of the Western District Plan.

Turning to Mr. Smith, again on the maximum analysis, you have three days for the assignment of counselor, 22 days between December 19th and the date when the motion was actually made returnable. I assume there was an extra seven days for reply on the case of Smith, so it's not entirely clear because the Government did not file an answer to that motion particularly, and 30 days under advisement which would give you 62 days construed the way I would construe it. But taking the most favorable period from Mr. Smith, you have eleven days from when the motion was made to when it was returnable and there is certainly excludable seven days for extra time for reply and 30 days for under advisement. That is 48 days. Taking the maximum amount, adding 62 to June 2nd, I get August 3rd. Taking the minimum amount I get July 20th. So, under either interpretation, as I see it, the Government has complied with the plan adopted by

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Discussion on Motions.
the Western District Court.

27a

(Continued on next page.)

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THE COURT: Under the Speedy Trial Act itself the sanctions of dismissal do not become effective yet. So, we go back to the, as I see it, to the Barker v. Wingo Rule 407 U.S. 514 - 1974 which sets forth four factors to be considered in any Sixth Amendment claims in any speedy trial, namely one, the length of the delay; two, the reasons for the same; three, whether or not the defendant has asserted his speedy trial rights; and four, whether any prejudice has resulted.

I want to backtrack one second. I have assumed in my first analysis that these motions were timely made. There is a question in my mind as to whether they were, even though the defendants, one of the defendant's counsel as I recall last Monday said that they intended to make the motions. I don't know if the Government acquiesced when the Court said that they would be deemed timely made. Of course, if the motions are not made prior to the election of the jury or under the Western District Plan and under the Speedy Trial Act, they are waived. And we selected the first jurors last Monday afternoon and motions were not made until after Monday afternoon. So, they may as a practical matter be deemed waived in their entirety anyway. But I assume for the sake

of argument that they were timely made. So, going back to Barker v. Wingo, the four reasons to be considered; one, the length of the delay; two, the reason for the same; three, whether the defendant has asserted the Speedy Trial Act; and four, whether any prejudice has resulted, going in reverse order there is no statement, no set of papers claiming any prejudice. Secondly, the defendants did not assert their Speedy Trial rights to the Court's knowledge until the subject was brought up during the voir dire or just before the voir dire. The next factor is the reason for the same, the reason for the delay. The reason for the delay appears to have been that the Court was involved with other very pressing business and I could only assume that based on what information has been given to me and what I generally know about the calendar in this district it is the reason why I am here because there is a very congested criminal calendar. So, all of those I think go to the prosecution. And finally, the length of the delay I don't think is unreasonable. It is under a year. Given the congestion of this Court's calendar and the availability of other judges in this circuit, which are practically nil, I don't think the length of the delay at this juncture

is unreasonable.

So, for all of those reasons the Court feels constrained to deny both motions.

MR. LARIMER: In light of your Honor's ruling I would like to make a few statements now if I may have that opportunity.

THE COURT: You may.

MR. LARIMER: Your Honor, just four brief points.

First of all, the Court mentioned some concern about the delay in filing the discovery motion in January of 1976. This Court may not be aware that in the Western District of New York if there are only two motion days a month, the second and the fourth Monday of every month --

THE COURT: That does not prevent the defendant through his interest in the speedy trial from submitting an order to show cause to a judge stating the reasons why he wants to have the motion heard on other than the motion day.

MR. LARIMER: That is correct, your Honor. That opportunity is afforded. There is no rule that is enforced in any event in this district requiring motions to be filed in ten days since the Government, usually the Government needs some time to file a

response. And in fact, they requested an adjournment to do just that after the motion date was set. I do not believe that that period from the appointment of counselor to the filing of motions should be held against the defendant Rucker. The Court has ruled otherwise.

THE COURT: I said under either circumstances, even if you take just the time between when you served your motion papers on January 6th and returnable on January 24th, I am saying that that is an 18 day period that must be held. That is particularly true as I see it under the statute and under 3161H1E.

MR. LARIMER: Well, that period of time I will agree with the Court, that plus the time under advisement is enough to get you over the hurdle right there. As to the Court's believe that the Government was ready on July the 11th when this case was called for trial, in fact at this time and on behalf of the defendant Rucker I announced that the defendant Rucker was ready, however we had not received certain information that the Government had been ordered to supply to us pursuant to a discovery order. And that information was not forthcoming for at least four days after July the 11th when the

Government indicated that they would let us look at the FBI investigator files. As to when the speedy trial issue was raised, it was before last Monday, October the 17th for September the 26th when I appeared in Court and the trial date was set for later in November. I advised Judge Burke at that time that I intended to file a motion for a speedy trial denial of a speedy trial because the trial was moved up several weeks earlier than we initially anticipated. I could not get those motions filed before the picking of the first juror. As to the lack of sanctions under the Speedy Trial Act, I think if the courts are holding that simply because the sanctions do not take effect for another year or 18 months, then that act is really meaningless, it has no basis at all and I think that let's the Government and the courts off the hook from trying to do something which Congress intended and that is all defendant should be tried within those specific guidelines. And I think the Court's discretion should hold the delay against the Government and the Court in this case and grant our motions.

THE COURT: Well, I will only comment on the last as I see it. The Court has a discretion until sanction time takes effect and must look to the

Barker v. Wingo factors. If it were to be otherwise, as I see it, you might well have a constitutional question here and frankly I don't think anyone has addressed themselves to it except in United States v. Martin. As the Second Circuit intimated that is found at 538 Fed. Section 921, 1976, the Second Circuit intimated that this constitutional question may be lurking in the background in that case. Take a look at Section 3 of Article 2 of the Constitution which provides among other things that the President "shall take care that the laws be faithfully executed." The Supreme Court has held in Queen (ph.) v. The United States 349 U.S. 155 and in Kilbourn (ph.) v. Thompson 103 U.S. 168, that the power of law enforcement is assigned under our Constitution to the Executive and the Judiciary to the extent that Congress in this act has drafted something that may give to a defendant more than he is entitled to under Sixth Amendment to the Constitution. Congress may have acted unconstitutionally and the Barker case delineates in this Court's view the parameters of the rights to a speedy trial under the Sixth Amendment. To the extent that Congress has attempted to narrow the rights beyond those four tests enumerated in the Barker case, it may run

afoul in this Court's opinion of Section 3 of Article 2 of the Constitution.

MR. WELCH: Would your Honor entertain the possibility of exhibiting briefs on that very question?

THE COURT: I don't think I need it. I have done considerable research on the question. Indeed, the information I have or in preparation for an article I was requested to write, I have some knowledge on the subject and I don't think I need any brief on that particular point. You look at the Martin case and you look at that section of the Constitution and I think you will understand what I am talking about.

MR. WELCH: Would your Honor entertain my motion at this time to deny their motion on the grounds that the Speedy Trial Act itself is unconstitutional in view of the at analysis?

THE COURT: I don't think it is necessary.

MR. WELCH: All right. Thank you.

THE COURT: I mean I am not going to cross Constitutional bridges in this case. Frankly, I don't think they have complied with the speedy trial plan or the factors involved in Barker. I am just pointing out to them that in the event that the Second Circuit should hold it otherwise, I think

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you have that constitutional argument.

MR. WELCH: Thank you, your Honor.

MR. LARIMER: Before the jury is brought in, there are a couple of other matters I would like to bring to the Court's attention, if I may. I believe Mr. Wolford has a similar additional request.

MR. WOLFORD: Yes, I do, your Honor. This is separate and apart from our motions in reference to the Speedy Trial Act. Friday afternoon we were served, both Mr. Larimer and myself, with a trial memorandum from the Government. I assume the Court was also supplied that. There is reference in there to the fact that, and I assume there is no jurors here, I see some unfamiliar faces.

THE COURT: Are there any jurors in the room?

(Whereupon, there was no response.)

THE COURT: All right.

MR. WOLFORD: (Continuing) The Government apparently pointed out in this trial memorandum that the defendant Rucker was previously convicted of bank robbery in connection with the same bank that is charged in one of these accounts in the indictment. They are intending to introduce his evidence in their direct case. That was the first time I became

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aware, of course, that he had in fact been involved in a similar type of robbery in the same bank. And at this time as a result of that, your Honor, I know the Court does not appreciate eleventh hour motions, but I would want to move at this time for severance of the defendant Smith's case of that of the defendant Rucker's case with reference to the count in the indictment that charges the defendant Rucker with conspiracy and aiding and abetting and commission of a crime at the Marine Midland Bank on Hudson Avenue. There are basically four counts in the indictment. Two counts relate to the First National Bank in September of 1976. Two counts of the indictment relate to the Marine Midland Bank in May of 1976. The defendant Smith who, of course, I represent, is not charged in any way with commission of the crime or the bank robbery at Hudson Avenue, but only with the First National Bank with defendant Rucker.

In view of the fact that the Government not only is intending to introduce evidence of the prior crime, but further more simply because in the event that defendant Rucker takes the stand, obviously that is going to be brought out which is going to be highly prejudicial not only to the defendant

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Rucker but defendant Smith. I would feel that there is sufficient grounds to separate those counts of the indictment. I am not saying that defendants Rucker and Smith should not proceed to trial on the trial on the one bank robbery, but not both. I think there is sufficient grounds to show that first of all there is no evidence that would be introduced on the Marine Midland robbery that would relate in any way to Smith. But I think the mere fact that the defendant Rucker's previous involvement in that same bank, in fact the conviction was received I think within a week of the commission of the crime, that is charged in the indictment, I think that would be prejudicial enough to associate the defendant Smith with the First National Bank. Furthermore, of course, it would give credence to the alleged co-conspirator Eddie Lee Brown's testimony that both Smith and Rucker were involved in this robbery at First National Bank with the same type of evidence of Mr. Rucker's involvement at bank was shown. So, on that basis and pursuant to Rule 40 of the Rules of Criminal Procedure I would ask that the release be granted to us.

MR. LARIMER: Your Honor, I oppose Mr. Wolford's motion. However I think the problem

could be resolved in an easier fashion. And I would request the Court at this time to make a ruling that the Government not be allowed to introduce in its case chief evidence of the January 1976 robbery at the Marine Midland Bank.

THE COURT: As against the defendant Rucker?

MR. LARIMER: As against the defendant Rucker, yes, your Honor.

THE COURT: On what basis?

MR. LARIMER: I think this is testimony I cannot imagine more prejudicial testimony to introduce --

THE COURT: Everything is prejudicial in a criminal trial. If they didn't introduce prejudicial testimony against your client they wouldn't have a case, we wouldn't be here.

MR. LARIMER: Prejudicial in that sense to be sure. But I think prejudicial in the sense that the Second Circuit and the Supreme Court have talked about concerning introduction of proof of other claims. I think the Supreme Court has stated that --

THE COURT: You certainly cannot deny this is similar.

MR. LARIMER: I have not seen any proof that

is similar.

THE COURT: Did you read the material attached to the papers?

MR. LARIMER: In great detail I read it. And if the Government intends simply to introduce the indictment, the proof of conviction and those statements, I think that is highly prejudicial.

THE COURT: I don't know if they're introducing all the statements, but certainly the statements of your man --

MR. LARIMER: If that is all they introduce I don't think that shows any scheme or plan whatsoever. All it shows is that there was another robbery that this man was involved in some several months before the robberies charged in this indictment.

THE COURT: That is what the similar acts are all about. If it is a similar act and close in time, my goodness, very close in time, and indeed in the very same bank by the very same person living two blocks away, whatever it is, I don't see how you can get a more apt illustration of a prior similar act which would be admissible under the rules.

MR. LARIMER: Under the Government's logic

I can. I think these robberies are so far disconnected in time and there has been no showing that the same modus operandi that the Government contends was used in this case, was used in the January robbery.

THE COURT: You should have been the counselor on the case I tried just before I came up here, Mr. Larimer where I allowed in on the counterfeiting charge a passing of a hundred dollar note seven years before by one of the defendants and he claimed on the prior occasion that he didn't know the note that he was passing was counterfeit. And I allowed it in on the issue of identity and similar act and so forth. You will be pleased to know that notwithstanding the fact that that evidence went in the jury found the defendant not guilty.

MR. LARIMER: Well perhaps that is a good omen for here, but I still feel constrained your Honor. I think in that case there was no conviction, there was not even an indictment of the prior similar act. But the passing of the note went in in any event. This is a much more and this is a real --

THE COURT: I don't think it was prejudicial

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in that case. It was an acquittal in that case and I don't think it would be necessarily prejudicial in this case unless the jury was satisfied in the first instance that this was a bank robbery in which the defendant was involved and it would only go to the question of intent and identity and so forth.

MR. LARIMER: Well, your Honor, the Court is indicating which way it's about to rule. But I think the Supreme Court case of *Spencer v. Texas* (ph.) 385 U.S. 554, 1967 case at page 560 stated the general rule that such evidence is generally recognized to have potential or prejudice and usually exclude except probative to show intent, motive and pattern of crime, etc. The court, of course, relies on the last part of that sentence, but I rely on the first part and I think this circuit on the *Lombard* case of prior conviction to impeach defendant should they take the stand and the *United States v. Bucko* case (ph.) 30C0453 Fed. Section 559 in view of the success or likelihood of prejudice this isn't to impeach defendants with reference to the crime similar to the one that the defendant is on trial requires particular care, full consideration and all and I think all

the courts have upheld that decision to exclude such evidence. It's virtually impossible for a jury to make the fine distinction that they will only use this evidence --

THE COURT: I might be perceptive to such suggestions. If you are worried about that conviction going in, to just let a statement that he gave to the police go in as evidence of the prior similar act, the conviction is nothing more than based on the evidence of such anyway .

MR. LARIMER: Well, I object to any reference to it.

THE COURT: Well, the prior similar act that is admissible under the rules as I see it.

MR. LARIMER: Unless the prejudicial value outweighs the probability of it. And I don't think there is much probability here.

THE COURT: I don't know. I don't know what your defense is going to be. But assuming your defense is going to be your man was not involved, then it goes to the question of identity. Also, if they find on the question, if they find that he was involved, then it goes to the question of intent to commit the crime.

MR. LARIMER: I think the matters should be

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left out of the Government's case in chief and perhaps we can argue the case again if the Government feels constrained to bring it in on rebuttal.

THE COURT: I assume on cross-examination you are going to have something. You are not going to forego the cross-examination of the Government's witnesses.

MR. LARIMER: I still feel this is highly prejudicial. And under the Bolling (ph.) case referred to, in the case I mentioned and the other cases, that this Court ought to exclude this type of evidence. I think it is so prejudicial since it is the same bank that the jury, there is no way that they can simply feel Mr. Rucker is a bad man and simply convicted --

THE COURT: I could give them instructions and I intend to on that subject. I am much more concerned about the argument of Mr. Smith's advances through his counselor on the severance question.

MR. LARIMER: Could I just say on this point one more minute concerning many of the Government's proof. I object to them strongly introducing statements of the defendant Rucker simply because

it happens to be attached to some file over in the County Clerk's office. We have made discovery motions months ago requesting any statements made by the defendant that are going to be offered into evidence and last Friday is the first time we received any indications that such a statement would be offered into evidence.

THE COURT: As I discovered it, he just discovered it, is that right?

MR. WELCH: Yes, it was late Thursday afternoon that I received this and for the first time discovered these statements attached to the Court record and wrote this memorandum for the Court and counselor.

THE COURT: We can do one of two things. We can have the policeman who took this statement identify it or you can accept it as a record that comes from the Court. If you don't and we can, that is just a question of authentication, I am sure we can get the policeman. In any event, part of the certified record. They are probably entitled to have the whole thing in, but I would be inclined if you objected strenuously to just let the admission of the prior offense go in.

MR. LARIMER: My point is had we known about

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the statement earlier, and I am not questioning Mr. Welch that he did not discover it last week, but our motions were framed in such a way that the Government should have discovered statements they intended to offer. And had we known about this earlier we certainly might have moved to suppress any such statements that were taken.

THE COURT: I am treating your motions now. I am saying I am not going to suppress it. I am going to, I will, of course, keep an open mind. I don't know what your defense is going to be. If your defense puts it in the posture where this wouldn't be relevant I might not let it in of course.

MR. LARIMER: Our defense will not come out until after the damage is done. The Government will talk to the jury at length about it in his opening statement.

THE COURT: We can hold up on that. He does not have to make any reference to it in his opening statement. He can see how it goes along until the time he wants to put it into evidence.

MR. LARIMER: At that point then I would like to renew my objection.

THE COURT: Let's see how it goes. Maybe I

will find out what your defense is. Of course, you may not make an opening statement.

MR. LARIMER: I would like to reserve my opening statement.

THE COURT: Then you can. Then it may be that I will have to cross the bridge, but I will cross the bridge when we get to that point. I am just letting you know where I think I am going.

MR. LARIMER: The Court is not making a preliminary ruling concerning the admissibility of that.

THE COURT: I am telling you given the present posture of what I know, I will let it in. If you have some unique defense which will rule out the thrust of this you better let me know about it before it starts to roll in, otherwise it's going roll in. Indeed, you have said you will reserve on your opening. I think I will let it come in on the opening. You can't play cat and mouse.

MR. LARIMER: I don't think we are required to do anything.

THE COURT: You don't have to. But if you are not going to do anything then I am going to let him do what he is entitled to do under the rules.

MR. LARIMER: That is why I asked for a preliminary ruling because I don't think the probability of that evidence outweighs the prejudice --

THE COURT: Let's get on to Mr. Smith. Why shouldn't he be entitled to just have a trial on count two and count four?

MR. WELCH: Two and four?

THE COURT: The other is a different bank robbery.

MR. WELCH: First of all, your Honor, the claim of surprise is, I don't think that that's what we begin with as I understand and counsel could correct me if I am wrong --

THE COURT: I am not concerned about the question. I have ruled on the prior --

MR. WELCH: I mean as to Smith as to severance motion, during the discovery motions that were made. The Government finally agreed to allow these people to review our entire file as well as give them the criminal records of the defendants Smith and Rucker. In reviewing what was disclosed to the defense counsel last week when the case was assigned to me, I discovered the first time in the criminal report the fact that Rucker --

THE COURT: You mean that was given to them

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last summer?

MR. WELCH: That is my understanding. You received the criminal records last summer.

THE COURT: That does make a difference.

MR. WOLF D: Of defendant Rucker? I received a copy of the defendant Smith's criminal record. I

(continued on next page)

can't say the information that was given to me by the United States Attorney's Office in my belief did not contain any reference to a robbery of the Marine Midland by the defendant Rucker in June of 1976. I can't say, equivocally guarantee it. Surely the information the United States Attorney supplied us with Friday was not given to us at that time. There was some reference to a previous bank robbery. I can't say I have seen it. I know he had previous records. I saw he is charged and convicted of - -

THE COURT: I don't think it is important where he appeared. If you knew he had a prior bank robbery conviction, I don't think you have the right to claim surprise now. I agree with Mr. Welch on that.

MR. WELCH: The second point I wish to make, even if the Court does rule it's timely, Smith is properly joined and your Honor will see the evidence shaping up to be that Smith and Rucker are just two people who live in the same neighborhood as most of these witnesses. And Smith and Rucker have acted in the same course of conduct, the same common scheme and plan to get other people to go in and rob the neighborhood bank. The two banks involved are both in the same neighborhood. They are both robbed by people who live in the same neighborhood as Smith and Rucker and just

part of the common scheme and plan. And I would be happy to stipulate with the defense counsel that Mr. Smith was not around in May of 1976, but came around shortly thereafter and became a participant with Rucker in the second crime. And your Honor I am certain will give a cautionary instruction that is admissible only to the identity of Rucker.

THE COURT: No question about that. No, it seems to me that the only thing that I would point out to you counselor is that this indictment has been on file for a year. You have two separate bank robberies. Your motion with respect to this question probably should have been made last January with reference to two separate times and two separate indictments. I think to bring it up now after we selected the jury, I think the prosecution is probably correct, it is not timely made.

MR. WOLFORD: May I comment. I think any case that deals with this question quite definitely will indicate the difference between simply being joined with another defendant and tried together. If a case in which some incriminating type of evidence is going to be presented against that other defendant, it was not until Friday that I was aware of what the Government intended to do with reference to any previous

convictions or statements.

THE COURT: Well you see the only thing that troubles me about your position is that you have had count one and count two and all the information with respect to that since last December almost a year ago. Now, if you are going to take the position that Smith and Rucker should have only been tried together in count two and four, the time to have made that motion was last January or actually on December 19, and to have severed these two cases then. Now is not the time.

MR. WOLFORD: Well your Honor, I don't dispute the fact that I may have had grounds back then to sever. I decided that it would probably be best for my client not to. On the other hand, it was not until Friday, and I don't think there is any question about that, but the Government clearly said this is what we plan to do with reference to the defendant Rucker. In my view that is a different ball game.

THE COURT: It's completely different if you had the copies of these defendants' criminal records. So, I am inclined to disagree and did not deny that motion on both the time and on the ground that I don't think there will be any prejudice after I finish instructing the jury, giving them the appropriate instructions.

* * * * *

Opening Statement by Mr. Welch.

case. Those words incorporate or that I have just said to you. All right.

We will have opening statements first by the Government.

(Opening statement by Mr. Welch.)

MR. WELCH: Good morning ladies and gentlemen. As you heard last week my name is Eugene Welch. I am the Assistant United States Attorney. It is my function here to call to with witness stand the witnesses that you need the hear in my view to decide the issues that you have to decide. Of course, this is my chance to make the opening statement to explain to you what I expect to prove and then the two defense lawyers could make their own opening remarks if they care to.

The Grand Jury has charged Danny Rucker and I expect to prove that Danny Rucker committed the crime of entry of a federally insured bank with the intent to commit a felony in that bank and the felony is to take its money from its employees by force, violence and intimidation. I intend to prove that that bank is the Marine Midland Bank, 1500 Hudson Avenue in Two Guys Plaza here in Rochester, New York.

I will prove that he committed this crime in a slightly different fashion than what you are expecting. That he committed the crime by causing Roberta Rivera

to exit that bank with a robbery note, causing somebody else to go into the bank.

I will also prove that he conspired with Rivera to do this as is charged in count three of the indictment which Judge Platt read to you last week. That that conspiracy included more than just that one visit to the bank.

Count one of course is the, what we call the substantive, causing somebody else to rob that bank. It talks about May 14, but you will hear testimony in Count three charging several different dates in May.

As to counts two and four the Grand Jury charged, and I am going to prove that Danny Rucker and Eugene Smith, the other defendant committed the same crimes only this time in the fall of 1976. This time it was a different bank, the same neighborhood the First National Bank in Georgetown Plaza, Ridge Roads East. I am going to prove that on September 29, 1976 they conspired with a man by the name of Edward Brown. This time they wanted Brown to go in and take the bank money and he did.

Keep in mind, of course, as I said that the indictment says that Smith and Rucker committed these crimes eventually with intent. We are going to prove that they committed these crimes, but that they committ-

Opening Statement by Mr. Welch.

ed them by sending in somebody else to do the robbery. Of course, Judge Platt will explain the law to you on aiding and abetting and causing another person to commit a crime.

How am I going to prove this? Well, I am going to call to the witness stand Robert Rivera, the man who actually went into the Marine Midland Bank. I am going to call Edward Brown the man who actually robbed the First National Bank, the two people that Rucker and Smith got to go in and rob these banks.

MR. WOLFORD: I object to the reference to Mr. Smith in the Marine Midland Bank. There is no charge that he did it or any proof.

THE COURT: I think that was a mis-statement by Mr. Welch. Of course, there is no charge here and indeed the prosecution conceded earlier this morning that Mr. Smith was in no way involved in the robbery of the Marine Midland Bank which is in counts one and three.

MR. WELCH: Yes, I think the ladies and gentlemen heard me say that Mr. Smith is involved in count two and four of the First National Bank. Mr. Rucker is involved in both. You are going to hear how Danny Rucker on May 12th psyched Robert Rivera to rob the Marine Midland Bank. And you will hear how Rivera

went into the bank and got scared and went out empty handed. You will hear on May 14th Rucker again got Rivera psyched up so he could go back into the same bank. This time Rucker gave Bob Rivera something, something Rivera used like a gun. You are going to have to Judge for yourself exactly what it is because you don't have that. You are going to hear Rivera describe it, a toy, a bee bee gun. But look at the way he used it. Look at the way Rucker wanted him to use it. This time he walked in and he is immediately recognized in the same bank that he was two days earlier in and he runs out again scared, empty handed.

Then we move on to September 29, 1976, when Rucker and Eugene Smith this time convinced - - excuse me this time Rucker convinces and this time with Eugene Smith they convince Edward Brown to enter the First National Bank in downtown plaza. When Brown was too afraid to take a gun from Smith they gave him a pipe cutting tool to use like a gun. Then they write him a note. They show him the bank and then they tell him casually rob the bank, casually get onto a ten speed bicycle and ride over to the Gold Circle Store where we will meet and split up the money. And, of course, what would you be looking for speeding away from a bank, certainly not a ten speed bicycle. And

Brown does just exactly that. He ends up at the Gold Circle Store with the proceeds of the bank robbery money, gives some of it to Eugene Smith. But before when Rucker comes back to get the rest of the money, before he could do that, Brown is arrested by the police department.

You will probably hear much about Brown still protecting Rucker and Smith. How he confessed, but said he was in it all alone. But I think you will understand why he said that when he was under interrogation moments after robbing the bank - -

MR. WOLFORD AND MR. LARIMER: Objection.

THE COURT: I will allow it.

MR. WELCH: You are also going to hear from other people besides Brown and Rivera, other people who live in the same neighborhood. And each one knows a little bit and a little piece that fits into a big picture. I am going to piece it all together. Obviously, some pieces of the puzzle are going to be missing, but there will be enough for you to see what is happening here.

MR. LARIMER: Objection. That is argumentative.

THE COURT: Yes, that is argumentative.

MR. WELCH: We are going to prove that these eventually took place in the same neighborhood where

Rucker and Smith got the neighborhood kids to go out and rob the neighborhood bank. You are going to have to pay close attention to these witnesses. For example, some of them don't know the correct names of other people that they see. You will hear nicknames like Bob or Whiteboy, Big Man, Mister Big or Pops, Pop. And you will have to pay close attention how each witness knows them because they may not know the full names of people they saw, but they know who they saw.

And I know that when you do pay close attention you will put it all together and come back with just kind of a verdict and a fair and just verdict. And that is all I am asking for.

THE COURT: All right. Do either of you wish to make an opening statement?

MR. WOLFORD: Yes I do your Honor.

(An opening statement by Mr. Wolford.)

MR. WOLFORD: May it please the Court, Mr. Welch, Mr. Larimer, Ladies and Gentlemen of the jury:

In case you forgot from last week my name is Michael Wolford. I am the attorney for Eugene Smith. Eugene Smith is the young man sitting next to me. And that is the only client I have in this courtroom and I am his attorney.

Well, it seems as though Mr. Welch has decided

* * * * *

MR. WELSCH: May I proceed, your Honor?

THE COURT: Please do.

MR. WELSCH: The Government calls Roberto Rivera, please.

R O B E R T O R I V E R A , called as a
witness having been first duly sworn by the Clerk
of the Court testified as follows:

Q Mr. Rivera, how old are you?

A Nineteen.

Q Back in May of 1976, Mr. Rivera, where did
you live?

A 501 Seneca Manor Drive.

Q Where is that located, Seneca Manor Drive?

A Located by Hudson Avenue and Joseph.

Q Is that here in the city of Rochester?

A Yes.

Q In May of 1976, did you know Daniel Lee Rucker?

A Yes.

Q Do you see Danny Rucker in the courtroom
today?

A Yes.

Q Would you point him out to the ladies and
gentlemen of the jury?

A Sitting down at the end of the table.

Q What is he wearing?

Excerpts of Testimony of Roberto Rivera.

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A He is wearing a blue jacket.

Q In the Seneca Manor Drive neighborhood back in May of 1976, did the people know you by any other name besides Roberto?

A They might have.

Q What did they call you?

A "White Boy."

Q Where did Rucker live at this time in relation to your place?

A 241 Seneca Manor.

Q On the same street?

A Yes.

Q Did you live in a high-rise or a duplex?

A High-rise.

Q Where did Rucker live?

A Duplex.

Q Did you know Eugene Smith?

A Yes.

Q At the time that you lived at Seneca Manor Drive, do you know where Eugene Smith lived?

A Yes.

Q Where did he live?

A He lived next door to Danny, but I don't know the address.

Excerpts of Testimony of Roberto Rivera.

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THE COURT: Danny being Mr. Rucker.

THE WITNESS: Yes.

Q Do you see Mr. Eugene Smith in the courtroom today?

A Yes.

Q Would you point him out to the ladies and gentlemen of the jury, please?

A The one with the three-piece suit over there.

THE COURT: What is the color of the suit?

THE WITNESS: Yellow.

MR. WELSCH: Let the record reflect he has identified Smith and Rucker.

THE COURT: Yes.

Q Mr. Rivera, I would like to direct your attention to Wednesday, May 12, 1976. And on that date, did you have occasion to see Danny Rucker?

A Yes.

Q Where did you see him that day?

A At the house.

Q Do you recall what time of the day it was?

A No, I think it was in the morning.

Q Who else was present?

A I think his brother.

Q Rucker's brother?

A Yes.

Q What if anything, did you talk to Danny Rucker about?

A We talked about the jobs that he wanted to pull on the bank, on a Marine Midland at the Hudson Two Guys.

Q What bank is that?

A The one on Marine Midland in Two Guys Plaza.

Q Located in Two Guys Plaza?

A Yes.

Q Where is that in relation to where you lived?

A Right across the street.

Q Across what street?

A Hudson.

Q Well, tell us to the best of your recollection exactly what Danny Rucker said to you.

A He said, "got a big job, big money, big time. I know we can do this one," he said, "it's easy. It's only right across the street. The cops are way downtown and we can get out there."

I said to him --

Q I am sorry. I didn't hear you. You have to keep your voice up.

A I said I don't remember what I said before.

Q Well, you just said the cops are way downtown.

Excerpts of Testimony of Roberto Rivera.

A Yeah, the cops are downtown, so I said I don't know if we can pull this. So he said, "why don't you go in," he said, "because they have my mugshot. So we talked for a little while, and he gave me an envelope and wrote it down.

Q Wrote what down?

A What to say to the teller. And --

Q What did he write on the envelope?

A Sort of vulgar language.

Q What did he write on the envelope? The jury has to know.

A He said, give me all you money, motherfucker, or I will blow your head off.

So he gave me a blue windbreaker jacket.

Q Who did?

A Danny; and a pair of glasses, sunglasses.

Q Anything else?

A No.

Q About how long did this conversation take place in Rucker's house?

A A couple of hours.

Q So what then did you do?

A So we then got into a gold Mustang, I think it was gold, I am not sure, and we drove up to the ramp,

Excerpts of Testimony of Roberto Rivera.

the high-rise ramp where they park, we drove under it and me and this other kid, Edward Brown, got out of the car and we walked up to the bank. And Edward stayed out and watched, and I went in. And I went to the doors, turned to my left and went to the first teller and --

A Where was Danny now?

A Danny was under the ramp in the car.

Q What side of Hudson Avenue is that?

A Across the street.

Q So you said you went into the bank?

A Yes.

Q What did you do inside the bank?

A Gave the teller the note and she sort of looked around and got nervous and I got nervous. So I grabbed the note and ran.

Q Where did you go then?

A I ran to about where the ramp was and Danny was not there. So I waited for Edward and Edward came running down. He told me to go to Danny's house so I ran all the way to Danny's house, and then Edward came later. So we talked.

Q Who talked?

A Me, Edward and Danny.

Q What did you talk about?

A That it did not work.

Q Did you see Danny again after that, after
May 12?

A Yes, May 14.

Q When did you see him on May 14?

A When?

Q When, yes.

A What time?

Q Approximately, if you know.

A About in the afternoon, I think it was in
the morning, the morning.

Q Where did you meet Danny?

A At his house.

Q Who else was present on the 14th?

A I can't remember.

Q Well, what if anything did you talk about
when you met with Danny?

A We talked about that he knew that we could
do it again, because they would not suspect anyone to try
it again.

Q Do what again?

A The bank robbery. So we talked for a little
while and I kept telling him I don't think it is going
to work. And he said, I will walk up with you. So he

got a brown bag, wrote the words down -- I don't know what the words were on that one. He gave me a black leather jacket, a white hat and sunglasses, mirrored, reflected kind. So we got out of the house, walked down to the ramp, followed me to the ramp where he stayed.

Q Did Danny give you anything else besides what you just told us?

A Yes, He gave me a cap gun, it was brown.

Q Would you describe to the jury what was it made out of, metal or plastic?

A Metal.

Q How did you know it was a cap gun?

A I don't know, but I know it was not a real gun, because there were no bullets, you couldn't even fire.

Q So then what did you do, you said you walked to the ramp with Danny. Then what happened?

A So we talked for a little, a couple of minutes and just as I was going up the ramp to go to the path --

Q What path?

A The path that goes behind the auto shop and up to the bank, behind the bank. So a man came out and jumped out of nowhere, sort of scared us a little bit.

Q Who was that?

A I don't know, the guy called Pops, I don't know his name though.

Q Did he talk with you?

A No, he didn't talk with us, he talked with Danny. Danny told me to leave and he was talking for a little while. So I left. And I went up to it.

Q Let's get that straight before we move away here.

Now, you said he didn't talk to us, he talked to Danny?

A Yes.

Q Who else was there?

A Just me and Danny.

Q Oh. So -- but he did talk to Danny?

A Yes.

Q Okay. Then you left?

A Yeah, then I left. So I went up to the back of the bank, walked in and there was a lot of people there, and so I just decided to get out of there, to leave, and --

Q Did anyone say anything to you in the bank?

A Yes, just as I was leaving, a woman yelled, "that was him, that's the one." So then this other guy came out after me, so I left out the doors, started running and this guy was chasing me.

Q Who was chasing you?

A I don't know who it was, he kept telling me to stop. He ran out from the bank and he was in there and so I ran across the street and Danny was supposed to be under the ramp. I don't know if he was there, so I looked -- I didn't have time to look, so I was running.

Q Was this fellow from the bank still chasing you?

A Yes, so he was chasing me and I was getting tired, so I got scared and pulled out the cap gun and he stopped, and I ran and --

Q What did you do with the cap gun when you pulled it out?

A I pointed it at him.

Q Did you say anything to him?

A I just said, keep away from me. So I put it away and ran, jumped over the fence and ran through my back door as there were people entering, so I ran all the way up the stairs to my apartment, and after a little while, Danny called.

Q Called?

A Yeah.

Q What did he say?

A He asked me what happened, so I told him

what happened. And he laughed. And I told him I don't want to do that again. So he told me, I asked him what about the clothes? He said to put the clothes in a bag and hold them until he sends somebody over to get them.

So I didn't want to wait, so I told my brother to throw them out in the incinerator and that was it.

Q Do you know this Edward fellow by any other name?

A Yes, his nickname is "Big Man".

THE COURT: What?

THE WITNESS: Big Man.

THE COURT: Big Man.

THE WITNESS: Yes.

MR. WELSCH: I have no further questions.

THE COURT: Mr. Larimer.

CROSS-EXAMINATION

BY MR. LARIMER:

Q Mr. Rivera, how long have you known Danny Rucker?

A About five years.

Q Would you say he is a good friend of yours?

A We got along all right sometimes.

Q You say sometimes, but you have had disagreements with him at times; didn't you?

* * * * *

Excerpts of Testimony of Roberto Rivera.

A F T E R N O O N S E S S I O N 128

(witness resumes stand)

CROSS-EXAMINATION

BY MR LARIMER: (continuing)

MR. LARIMER: Can we approach the bench?

(sidebar)

MR. LARIMER: Your Honor, in light of the testimony that has developed, we would like to order daily copy or expedited copy of his testimony, most likely the testimony of Mr. Brown, since we are appointed. I think the Court has to authorize that.

THE COURT: I am not going to authorize it unless the prosecution orders it.

MR. LARIMER: I spoke to the reporter before we commenced and she thought maybe she could check with the regular court reporter, Mr. Jacobson, and see if this could be done.

MR. WOLFORD: Only the two accomplices.

THE COURT: I don't usually do this unless the prosecution orders it and if they are not going to order it, I would not do it.

MR. WELSCH: It is not our intention to order it.

THE COURT: You will have to rely on your

notes.

(open Court)

Q I think when we recessed, sir, I had given you a copy of the Grand Jury testimony, Defendant's Exhibit B.

Did you have a chance over the recess to review that testimony?

A Yes.

Q Isn't it a fact that there is no mention in your Grand Jury testimony concerning a "Pops"?

A No.

Q When was it, sir, that you first recall Pops being near the bank on May the 14th, 1976?

A When he was coming home from school.

Q I said when is it that you first recalled testifying about that fact, since you didn't mention it in your statement to the FBI in September nor to the Grand Jury in October of 1976?

A Because I didn't remember about it then.

Q My question is when did you suddenly remember about it?

A Just now.

Q Just this morning when I asked you about it?

A Yes.

* * * * *

Excerpts of Testimony of Rene Rivera.

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R E N E R I V E R A , called as a
witness, having been first duly sworn by the Clerk
of the Court testified as follows:

DIRECT EXAMINATION

BY MR. WELSCH:

Q Mr. Rivera, what is your relationship to
Roberto Rivera?

A He is my brother.

Q Back in May 14, 1976, where did you and your
brother live?

A 501 Seneca Manor Drive.

Q I would like to direct your attention to
that date, May 14th, 1976.

Do you recall anything unusual happening with your
brother that day?

A I was watching T.V. and my brother came in
the door and all nervous and shaken up and something I
didn't know at the time. He ran around the room or
something, he was walking around the house and stuff and
all nervous. And then later on about ten minutes after that,
the phone call came and he talked for awhile.

Q A phone call came in?

A Yeah, and he talked and then after he finished,
he told me.

MR. LARIMER: Objection to anything the

witness told this witness.

THE COURT: Sustained.

MR. WELSCH: May we be heard on that, your Honor?

THE COURT: Yes.

(sidebar)

MR. WELSCH: Counselor's objection to what Roberto said, it is the Government's position that it was in furtherance of the conspiracy by a co-conspirator, that is Danny Rucker told him to have his brother destroy the bank robbery clothes.

And we offer --

MR. LARIMER: That is hearsay and not through this Rivera.

THE COURT: It is a statement made. He is offering it as a statement made by one of the conspirators during the conspiracy, well, the conspirator Roberto Rivera.

He is saying it is the same as he talked to Rucker and Rucker made the statement during the course of the conspiracy --

MR. WOLFORD: We might be able to argue that Mr. Rivera is withdrawing himself from the conspiracy by his own admission that on May 14th he had no

Excerpts of Testimony of Rene Rivera.

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intention of robbing that bank and left. I would think that he had withdrawn himself from any conspiracy and as a result, any further statement made by him would not be admissible.

THE COURT: Not if he covers up the evidence that is part, that would be part of the conspiratorial plan.

Anything, any transaction which would either cover up evidence or attempt to conceal the conspiracy would still be part of the conspiracy.

MR. WOLFORD: The question is what he did. So far, his testimony is that he has withdrawn himself, so --

THE COURT: Not until he is arrested.

MR. WOLFORD: You say you cannot withdraw from a conspiracy until you are arrested?

THE COURT: In this case, as I recall the testimony, he gave the clothes to his brother to put in the incinerator. So this is to explain that and it is part of the cover-up of the activities.

I think I will have to allow it on that basis.

MR. LARIMER: Note my objection.

(open Court)

THE COURT: On the basis of the discussion that we had at the sidebar, I will change the ruling

to the objection to an overruling.

You may answer the question.

A He told me Danny had told him to put the clothes in a bag and throw them out. So I did that. I went and threw them out in the basket in the incinerator, which is down the hall from our door.

Q What did you throw out?

A The clothes that he wore the hat and the gun.

Q Did you see the gun?

A Yes.

Q Would you describe it to the ladies and gentlemen of the jury, please?

A Well, it was nothing really like a gun. It won't shoot. It looked like a gun from a distance, but you could see it if you were close up that it won't fire or anything like that, because it didn't look like a gun. It was a gun, I guess.

Q Well, was it a gun or wasn't it a gun?

A Yes, it was.

Q Prior to that date, May 14th, 1976, did you yourself have occasion to speak with Danny Rucker?

A Yes, he asked me if I wanted to --

MR. LARIMER: Objection. May we approach the bench, your Honor?

* * * * *

A That particular bank, the one they took, the one they did.

Q The one who did?

A The one Danny did. Danny and my brother, I don't know who else was with them. I just know it is my brother and Danny, and I think it was Edward Brown that was with them at this time. I don't know if it was the first one or the second one.

MR. WELSCH: I have no further questions,
your Honor.

CROSS-EXAMINATION

BY MR. LARIMER:

Q Mr. Rivera, Roberto is your brother?

A Yes.

Q And you live together?

A Yes.

Q You talked to Roberto about your testimony here today?

A No.

Q You have not talked to Roberto at all about what happened on May the 12th, or May 14, 1976?

A No, just about what I had in my head -- not what I had in my head -- excuse me -- what I was supposed to say.

Excerpts of Testimony of Rene Rivera.

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Q You talked to Roberto about what you were supposed to say?

A No. What I remembered what happened when he came in the door.

Q When did you talk to Roberto about that?

A About three weeks ago.

Q What was it that prompted that conversation?
Was the FBI there?

A No.

Q What was it that caused you to talk to your brother about the events of, say over a year ago?

A Because he had seen the FBI agent and told me that I had to go to Court and he told me that I had to remember when he came in the door and stuff like that.

Q Up to that time, you were not expecting to testify?

A No. I didn't know that I was supposed to go to Court, because he didn't tell me anything until just two days ago.

Q So it was two days ago that you first talked to him?

A No. It was Thursday that he told me, Thursday.

Q Last Thursday, October the 20th, 1977?

Excerpts of Testimony of Rene Rivera.

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A Yes.

Q That is the first time you talked to him about testifying in this case?

A Yes.

Q And he told you that an FBI agent talked to him and that you had to testify?

A Yes.

Q Well, then did Roberto start telling you things that you should remember?

A Start telling me things that I should remember?

A Did Roberto talk to you and say remember this day I did this and this?

A Yes.

Q Well, how long did you and Roberto have that conversation?

A Not long, just about twenty minutes.

Q Roberto telling you things that you should remember about May 12 or May 14, 1976?

A Yes.

Q So isn't it a fact that you are really testifying here about what Roberto remembered, not what you remembered?

A No. What I remember, because he asked me do I

Excerpts of Testimony of Rene Rivera.

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remember when he came in the door and I said, yes, I remember when he came in the door and the day he did it.

Q When was it that Roberto first told you that he did it?

A It was the day that he ran in the door.

Q May the 12th, he told you?

A Yes.

Q How do you recall Roberto looking on that particular day?

A Nervous, shaken up.

Q Was he sweating at all?

A No.

Q Do you know if he had been on drugs that day?

A No.

Q Have you ever seen him on drugs?

A He was not on drugs that day.

Q But he has been on other days?

A No.

Q You have never seen him use marijuana?

A No.

Q Now, you do know Edward Brown, do you not?

A Yes.

Q AS far as you know, does your brother know Edward Brown?

Excerpts of Testimony of Rene Rivera.

A Yes.

Q Would you say that you are a good friend of Edward Brown?

A Yes.

Q Would you say your brother is a good friend of Edward Brown?

A Yes.

Q In the last year, from October of '76 to October of '77, have you ever been in the presence of Roberto Brown -- excuse me -- Edward Brown?

A No.

Q You have never been with him at all during that year period?

A What do you mean, next year, last year?

Q October of '76, that is a year ago until today.

A No.

Q Have you been in the company of Edward Brown --

A No.

Q Have you ever seen Roberto in the company of Edward Brown in the last year?

A No.

Q When was the last time you remember being in the presence of Edward Brown?

Excerpts of Testimony of Rene Rivera.

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A It is when we used to live there.

Q When was it that you moved from that neighborhood?

A It was on August, the middle of August.

Q '76?

A Yes.

Q Do you recall ever being in the presence of Mr. Brown on August of 1976?

A Just before we moved.

Q Was Roberto also in the presence of Mr. Brown in August of 1976?

A No, that day I was just with him.

Q After this occurrence in May of 1976, were you ever in the presence of Edward Lee Brown?

A After the occurrence?

Q Yes.

A I don't remember.

Q How about your brother, have you ever seen Roberto in the presence of Edward Lee Brown after May of 1976?

A No, just a couple of times, when we used to go over his house and stuff.

Q Roberto would go over to Edward's house?

A So would I.

Q Well, how often do you think that occurred after May of 1976 until you moved in August of 1976?

A Well, we used to see him like every couple of days or like ever day go over to his house or something like that.

Q This is Edward Brown's house?

A Yes.

Q When Roberto came in your house on May the 12th, what did he tell you that he had just done?

A He told me what happened.

Q What did he tell you?

A He told me that Danny had told him to rob the bank, told him how to rob the bank and what to do and to throw out the clothes after he called. That is what he told me.

Q Well, throwing out the clothes, that discussion took place after the telephone call, didn't it?

A Yes.

Q What I want to know is when your brother first came in the house, what he said about the events of that morning?

A He was just nervous and stuff and when he came in through the door, and he just said, what should I do, what should I do, the cops were chasing him or something,

that someone was chasing him.

Q He said that Danny Rucker told him how to rob the bank?

A Yes. He told me that he gave him a note to give to the teller and what to say.

Q Did he say anything else about what Mr. Rucker told him?

A No.

Q Did he ever tell you what he was supposed to get out of this robbery, that is your brother?

A No, he didn't tell me anything; you mean about the money?

Q Yes.

A No, he didn't tell me about that. He didn't tell me whatsoever about that. He jsut told me the fact that what he was supposed to do.

Q Did he mention Mr. Brown being involved in this occurrence?

A Yes.

Q When did he tell you that?

A That same day.

Q What did he tell you Mr. Brown did?

A He said that he was standing at the door. He said that he didn't come in, that he just went in, my brother

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Excerpts of Testimony of David L. Jackson.

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MR. WELSCH: The United States calls
David L. Jackson.

D A V I D L. J A C K S O N , called as
a witness having been first duly sworn by the Clerk of the
court testified as follows:

DIRECT EXAMINATION

BY MR. WELSCH:

THE COURT: Mr. Jackson, talk into the
microphone, will you?

Q Mr. Jackson, where did you live in May of 1976?

A 169 Seneca Manor Drive.

Q In fact, right now you no longer live there.

You are at school; is that correct?

A Yes.

Q Where are you in school?

A Tougaloo, Mississippi.

Q Did you graduate from high school?

A Yes.

Q What high school?

A Benjamin Franklin.

Q When did you graduate from Benjamin Franklin?

A June 30, 1977.

Q Do you recall what your average was when you
were at Benjamin Franklin?

A B . average.

Q When you were living at Seneca Manor were you known by any other name other than David L. Jackson -- a nickname?

A Yes.

Q What was that?

A Pop.

Q Do you know of Danny Rucker?

A Yes.

Q Do you see him in the courtroom today?

A Yes.

Q Would you tell the Court and jury what he is wearing?

A He has on some green slacks, a jacket, and sitting right over there.

Q What color shirt does he have on, or coat?

A It's a jean jacket, it looks like from here.

MR. WELSCH: Let the record reflect he has identified the defendant, Rucker, your Honor.

THE COURT: Any question about it? All right, so reflected.

Q Now, Mr. Jackson, I would like to direct your attention to Friday, May 14, 1976. Do you recall seeing Danny Rucker on that date?

A Yes.

Q At about what time of the day was that that you saw Danny Rucker?

A About 2:45 or 3:00.

Q How can you be so sure of the time?

A Because I stayed after school and I came home late.

THE COURT: You stayed after school?

THE WITNESS: Yes.

Q Where did you see Danny Rucker?

A Under the Keebler Apartments.

Q Where is that?

A You see the Keebler Apartments are like on Seneca Manor and the ramp is like up under it -- you know the ramp.

Q The name of the street that runs in front of the Keebler Apartments is Seneca Manor?

A Right.

Q Where there did you see Danny Rucker?

A Well, coming from Hudson Avenue -- it's like a pathway you know, and I take the shortcut through there and I will be going home. When I come home from school and I walk down there and jump down on the ramp and I seen him right there.

Q Was anyone else with him when you saw him?

Excerpts of Testimony of David L. Jackson.

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A Yes.

Q Who?

A Bob.

Q Do you know Bob by anything else besides Bob?

A Yes.

Q What?

A "Whiteboy".

Q Was anybody else there?

A No.

Q Did you have any conversation with either
Bob or with Danny Rucker?

A Yes.

Q What did you say and what did they say?

A Well, I said, "What's happening," and I kept
on going and he told me that he had psyched Bobby Whiteboy
to rob the bank.

Q Who told you that?

A Danny Rucker.

Q When was the next time you saw -- well before
I move on, what else happened at that time -- anything else
happen then? Was Whiteboy still there when Rucker told you
he psyched him into robbing the bank?

A No, he had went up to the bank.

Q Who did?

A Bobby Whiteboy.

Q Prior to Bobby going to the bank had you seen Rucker give Bobby anything?

A He gave him something. It looked like a gun or something. I couldn't recollect, you know, to my knowledge what he gave him, but he gave him something.

Q When was the next time you saw Bobby?

A I seen him running. I seen him running.

Q Where did you see him running?

A Up under the ramp.

Q Which direction was he running from or to?

A He was running in the direction from the bank over to the Keebler Apartments like.

Q Was anyone else running at that time?

A Yes. Danny Rucker was running with him. He was ahead of him.

Q Anybody else?

A No.

Q Are you sure of that or is it that you just don't recall whether or not there was somebody else running?

A Running with Danny Rucker, you mean? What are you talking about?

MR. WELSCH: I withdraw that last question, your Honor. I have no further questions.

* * * * *

Excerpts of Testimony of John Bartolotta.

he looked.

MR. LARIMER: I have nothing further.

MR. WOLFORD: No questions -- well nothing further, your Honor.

THE COURT: You may step down.

MR. WELSCH: The United States calls John Bartolotta.

J O H N B A R T O L O T T A , called as a witness having been first duly sworn by the Clerk of the Court testified as follows:

DIRECT EXAMINATION

BY MR. WELSCH:

Q Mr. Bartolotta, would you tell the ladies and gentlemen of the jury and the Court how you are employed?

A I am employed as bank manager of Marine Midland Bank on Hudson Avenue office.

Q You have to speak more loudly and into the microphone.

Is that located in the 2-Guys shopping plaza?

A Yes.

Q What is 2-Guys?

A That is a discount department store.

Q Were you so employed on May 14, '76?

A Yes.

Q I would like to direct your attention to that date, particularly around 10:40 on that date. Would you tell us what if anyt unusual happened that day?

A Yes. I was in the platform area of the bank and I heard my teller yell about an individual was in the bank. She said "That is him," referring to an individual who had passed the note to her earlier that week.

Q And what if anything did you do?

A Well, I went on to chase the individual and tried to apprehend him.

Q And how far did you chase him?

A Well, I chased him out the doors through the 2-Guys parking lot across the street into the Keebler project where I lost him.

Q What is the name of the street where the Keebler Apartments are?

A Seneca Manor Drive.

Q Does Seneca Manor intersect with another street?

A Hudson Avenue.

Q What if anything did you see -- did you see the person you were chasing while you were chasing him?

A Well, I was chasing him probably about 20 yards before he hit the Hudson Avenue -- at that time he

pulled out what looked to be like a revolver or a gun and at that time I kind of shouted down and he kept running and I just --

Q What did he do with the gun?

A He pointed it at me.

Q Did he say anything?

A No, he didn't say anything.

Q Do you recall whether he was white or black?

A Yes, he was white.

Q Are the deposits of the Marine Midland Bank insured by the FDIC?

A Yes, they are.

Q You brought with you today the original certificate of that insurance?

A Yes.

Q I am showing you what has been marked for identification as Government's Exhibit No. 2. Can you tell us what that is?

A That is our Federal Bank Charter stating that we are insured by the FDIC.

MR. LARIMER: I have a preliminary objection, but can I take the witness on a voir dire?

THE COURT: Let me see the document. Are you offering the document?

* * * * *

Excerpts of Testimony of Edward Lee Brown.

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E D W A R D L E E B R O W N , called as a
witness having been first duly sworn by the Clerk of the
Court testified as follows:

DIRECT EXAMINATION

BY MR. WELSCH:

Q Would you state your name?

A Edward Lee Brown.

THE COURT: Mr. Brown, please try to talk into
the microphone, if you will please.

THE WITNESS: Okay.

Q Mr. Brown, where did you live in September
of 1976?

A 138 Seneca Manor Drive.

Q Do your friends know you by any other name
besides Edward Lee Brown?

A Yes, they do.

Q What is that name?

A "Big Man".

Q Now, Mr. Brown, you have been convicted of a
felony -- of an armed robbery; is that correct?

A Yes, it is.

Q In fact you were convicted for your involvement
in the robbery of the First National Bank; is that correct?

A Yes.

Q And in fact you testified before the Federal Grand Jury; is that right?

A Yes, I did.

Q After that you received a sentence of probation?

A Yes, I did.

Q In September of 1976 did you know Danny Rucker?

A Yes.

Q Do you see Danny Rucker in court today?

A Yes, I do.

Q Would you tell the ladies and gentlemen of the jury what he has on?

A Well, he has on I believe it is a -- I can't see it because of the shadow, but I believe a green pair of pants and it's like a blue light sweater or something.

MR. WELSCH: May the record reflect he has identified defendant Daniel Rucker.

THE COURT: There being no objection, all right.

Q Where did Danny Rucker live when you lived in Seneca Manor Drive?

A He lived right across from me in the same project.

Q Was it on the same street?

A Yes, the same street.

Q In that project there are highrises

duplexes, and garden apartments, aren't there?

A Yes.

Q Where did you live in the highrise, duplex or garden apartments?

A I lived in the duplex. There was no apartment so, the duplex.

Q Two families lived in each house; is that right?

A Yes.

Q Where did Danny Rucker live at that time?

A He lived in the same duplex that I did, like right across -- not across, but over by the highrisers. There was a fence there.

Q Do you know Danny's mother's name?

A I believe it's Sally.

Q Do you know Eugene Smith?

A Yes, I do.

Q Do you know Eugene Smith by any other name?

A Gene.

Q I didn't hear you.

A Gene.

Q Where did Gene Smith live -- are you saying Gene or Geney?

A Geney.

Q Where did Geney Smith live?

A Right next door to Danny Rucker.

Q On Seneca Manor Drive?

A Yes.

Q Now, I would like to direct your attention to September 29, 1976. Did you have occasion to see Danny Rucker that day or Smith?

A Yes, I did.

Q Who did you see first, Smith or Rucker?

A I seen Geney first.

Q Where did you first see him?

A In my house up in my bedroom.

Q Was he staying at your bedroom?

A No, he was there and I was sleeping and my mother called up and said Geney was here; he wanted to see me with something very important and you know my mother got me up.

Q What did Geney talk to you about if anything?

A He told me that he knew how to get some money and I said, "Well, how are we going to get some money?"

And then he told me him and Danny got a plan and I said, "What kind of plan?" So then he told me to get up and come see. So I got up and I went.

Q Where did you go?

Excerpts of Testimony of Edward Lee Brown.

A I went to Danny's house.

Q When you got to Danny Rucker's house who else was there?

A Well, it was me, Danny and Geney Smith, and I can't tell you who else was there. I really can't remember.

Q Who did you speak with?

A Just me and Danny was speaking -- me and Geney.

THE COURT: Mr. Brown, please talk into the microphone. It's very hard for the jury to hear you unless you do it.

THE WITNESS: Okay.

Q All right. Would you tell the ladies and gentlemen of the jury what you, Rucker, and Smith talked about when you were at Rucker's and try to remember who said what?

A Okay. Well, we came in. I came over there to Danny -- you know, Danny's house with Geney Smith and then we started talking about you know, about robbing this bank. And at first they said, I believe it was Lincoln first, and Whitey knew where it was at, and I said where is it at, and Danny said, "Don't worry. We will show you."

Excerpts of Testimony of Edward Lee Brown.

So they told me. They said that all they had to do was go in there with a pair of shades and a hat and give the teller a note and you know demand some money.

Q Who was supposed to do that?

A Me.

Q Did either Rucker or Smith tell you why you were supposed to be the one going into the bank?

A Yes, they did.

Q What reason did they give?

A Because I didn't have no photos downtown.

Q Did they describe what bank they wanted you to rob?

A Well, yes. They took me up there to it.

Q Before they left the house what else did you do or what did they do?

A Well, you know they -- well, Danny wanted me to take a rifle up there and I wouldn't do it.

Q A rifle?

A It was like a -- the barrel was cut off. I don't know what you call it, but I believe it was like a sawed off of a rifle.

Q Did you see something?

A I seen a rifle.

Q Who showed you a rifle?

A Danny showed it to me.

Q Danny showed you a rifle.

What did you say to that?

A Well, you know, I said I was not carrying no kind of weapon --no gun.

Q What else did they do?

A Well, after we had left Geney's house and went back over Danny Rucker's house --

Q Let me back up here. I think where we left off you were at Rucker's house. When did you get to Geney's house?

A We went over there to get the rifle.

Q You left Rucker's to go to Geney's house to get the rifle?

A Yes.

Q Where was it?

A It was upstairs in the second floor like a landing. It looks like a hollow inside where the attic is supposed to be, but there is nothing up there.

Q Now, did you take that gun?

A No, I didn't.

Q Then what happened?

A Well, he said I had to have something -- you know, I had to have a gun and I said I wouldn't do anything.

So Danny said, "Well, okay then."

Then we went back to Danny's house and we were in the basement and he got me a little like a metal cutter and told me I could take this because it looked like a gun.

Q What did you have on that day?

A What did I have on?

Q Yes.

A I had on I believe a pair of jeans on and my army jacket.

THE CLERK: Government's Exhibit 3 marked for identification.

(so marked)

Government's Exhibit 4 marked for identification.

Q Mr. Brown, I am going to show you what has just been marked as Government's Exhibit No. 3 for identification, and tell the ladies and gentlemen of the jury what that is?

A Well, this right here is my army jacket.

Q Is that the jacket you had on the day of the bank robbery?

A Yes, it is.

Q I am going to show you what has been marked for identification as Government Exhibit No. 4 and would you

tell the ladies and gentlemen of the jury what that is?

A This is the metal cutter that I had -- the cutter that I had on the day --

THE COURT: Can you all hear him back there?

JURY: Yes.

Q Where did you get the metal cutter?

A From Danny, in his basement.

Q Did you have any conversation with him about that metal cutter while he gave it to you?

A Well, yes. He told me that I was to use this metal cutter.

Q Did he show you how to use it?

A Yes.

Q Would you describe to the ladies and gentlemen of the jury what he said and how he told you to do it?

A He just told me to stick it in my coat pocket and hold it like this.

Q And why don't you show the ladies and gentlemen of the jury what he told you to do?

A This right here. (indicating)

Q He told you to put it in your pocket and hold it like that?

A Yes.

Q You can sit down please, and talk into the

microphone.

What else did you talk about while you were back at Rucker's?

A Well, we used a bicycle. I was told to use a bicycle.

Q You were told by who?

A By Danny Rucker.

Q Before you left Rucker's house was there any discussion about a note?

A Yes, there was.

Q Who said what?

A Well, Danny was writing out a note for me to bring up to the teller but it must have been wrong. It was not like they wanted. So Eugene Smith brought out a different note.

Q He brought out a different note?

A He brought out a different note.

THE CLERK: Government's Exhibit 5 marked for identification.

(so marked)

Q Mr. Brown, I am going to show you what has just been marked for identification as Government's Exhibit No. 5 which I have shown to defense counsel also. Do you recognize that?

Excerpts of Testimony of Edward Lee Brown.

A Yes, I do.

Q Would you tell the ladies and gentlemen of the jury what that is?

A This is the stick-up note at Lincoln First Bank.

Q This is the second time you said Lincoln First Bank; do you recall the name of the bank you robbed?

A I believe it was Lincoln First -- I believe.

Q Do you know where it was located?

A On Ridge Road.

Q Where about on Ridge Road?

A Around the corner.

Q Where was it in relationship to where you lived?

A I believe a couple of blocks and it was in walking distance.

Q Is it your testimony that it was the Lincoln First Bank or you can't recall the exact name of the bank?

A Well, I can't recall the exact name of the bank because it was my first time there.

THE CLERK: Government Exhibit 6 marked for identification.

(so marked)

Q Mr. Brown, I am going to hand you what has just

* * * * *

Excerpts of Proceedings, dated 10-25-77.

224

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

DANIEL LEE RUCKER and
EUGENE SMITH,

Defendants.

United States Courthouse
October 25, 1977

B e f o r e:

HONORABLE THOMAS C. PLATT, U.S. D. J.

MR. WELSCH: May I proceed, your Honor.

THE COURT: Yes, please do, Mr. . . .

MR. WELSCH: Mr. Brown to the stand. Please Mr. Brown, resume the witness stand and remember that you are still under oath.

BY MR. WELSCH:

Q Well, Mr. Brown, you are still under oath. Last night at the recess I asked you to read Government's Exhibit No. 6 to yourself. Did you have occasion to read that exhibit?

A Yes, I did.

Q Did that refresh your recollection as to the name of the bank that you robbed on September 29, 1976?

A Yes, sir.

Q What bank was that?

A It was the First National Bank.

Q And where was that located?

A On Ridge Road.

Q Is it near any other stores?

A Yes, it was down the street from Gold Circles.

Q Yesterday I asked you to take a look at Government's Exhibit No. 5 and tell the Ladies and Gentlemen of the Jury when you first saw that. Would you tell

them when you first saw Exhibit 5?

A When I first saw this, this note, in Danny Rucker's house.

Q And who prepared that note?

A This note right here was prepared by Eugene Smith. It was prepared by Eugene Smith.

Q Have you seen that envelope before?

A Yes, I have.

Q Where did you see that envelope before?

A I had seen this envelope in Danny Rucker's house.

Q Why don't you tell the Ladies and Gentlemen of the Jury just exactly how that took place?

A Well, this note, it was a note before this that was made up by Danny Rucker. But they didn't use that note. We used this note right here, this note right here.

Q Where was that note prepared?

A It was prepared on the morning of the robbery.

Q Now, you also said something yesterday about a bicycle. Would you explain to the Ladies and Gentlemen of the Jury where the bicycle came up in the conversation?

A Danny told me I could use the bicycle in the

bank job. He told me that to take it and park it on the blind side of the bank.

Q What bicycle are you talking about?

A The girl's bike, the ten speed.

Q Do you remember what color it was?

A It was green.

Q Do you know whose bicycle it was?

A He told me it was his sister's bike.

THE COURT: I am not sure I got the word, the blind side of the bank. I didn't know the bank had a blind side.

THE WITNESS: I mean where the wall was at, the wall of the bank.

Q Well, where did you get the green jacket that you had on that day?

A That was mine when I was in the service.

Q And were you discharged under honorable conditions?

A Yes, I was.

Q Well, did you eventually go to the bank that day?

A Yes, I did.

Q How did you get to the bank?

A Well, me, Gene and Danny, we walked up and

Gene was walking the bike up the door to Gold Circles and we got there and Danny told me --

Q You said you were walking the bike up to Gold Circles?

A Yes.

Q Now, where is the bank, Gold Circles and Rucker's and Smith's house in relation to each other? Tell the Ladies and Gentlemen that first of all.

A Well, the bank and Gold Circles?

Q Yes.

A Well, the way that we walked up, the bank is about, it's just a little ways down the street. Really not that far. Probably about a half a block or somewhere around there. Not that far.

Q Did you have to pass the bank to go to Gold Circles?

A Yes, I did have to pass the bank.

Q Did you walk by the bank?

A Yes, we did.

Q And who was with you when you walked by the bank?

A Danny Rucker and Eugene Smith.

Q Was there any conversation as you were walking by the bank?

Excerpts of Testimony of Edward Lee Brown.

A Yeah, Danny told me I was supposed to do it again.

Q What did he tell you?

A I was supposed to park the bike on the blind side and when I go in , just give the lady the note and tell her that I would shoot her if she didn't give me some money.

Q Was there any further conversation about what was supposed to happen and after you got out of the bank, what happened?

A Well, after I got the money, I was supposed to leave the bank and get on the bike and ride over to Gold... Circles.

Q On the bicycle? On the bicycle?

A On the bicycle.

Q What was supposed to happen at Gold... Circles?

A Well, Gene was supposed to be waiting for me to get the money and take the bike and ride off back to Danny's house.

Q Now, after you walked by the bank, where did you go?

A After we walked by the bank, we went to Gold... Circles.

Q And then what happened?

A Well, Danny was supposed to find the bathroom for me. So when I come out of the bank, I was supposed to give the money to Gene and Gene was supposed to ride off on the bike and I was supposed to buy me a pair of pants and a shirt and a sweater and change. And Danny was supposed to come back and get me in his brother's car.

Q Why was Danny looking for the bathroom for you?

A So I could change, so I could change clothes.

Q Now, what happened after that?

A Well, are you talking about after?

Q After you talked at Gold Circles.

A I can't hear.

Q After you had this conversation with Danny and Gene at Gold Circles, what did you do next?

A Well, after that then I got on the bike and I rode over to the bank and parked it on the blind side and I went in.

Q When you went in, did you notice anybody else in the bank besides the tellers? Any customers?

A I believe there was one other customer and a little boy. I am not sure, but I recollect -- I remember

the little boy.

Q When you got inside the bank, what did you do?

A Well, I didn't do anything because there was a couple people around. So what I did was just went to the little counter and they were, I don't know, signing checks or whatever. So, I went there and I was stalling and I was stalling until they left. I then finally -- They then finally left and I went over to the counter to the teller.

Q What did you do when you got to the counter?

A Well, I gave the lady the note and she read it and then she passed it off to another lady and --

Q What were you doing while they were reading the note?

A I was scared. I was sweating.

Q Were you doing anything with your hands?

A Yeah, I had my right hand in my coat pocket.

Q Did you say anything?

A Yeah, after the lady passed the note again, I told her, "Don't try any thing." Then I told her I was a junkie and that I needed this money because I needed a fix.

Q Did you threaten her with the gun or threaten her -- threaten to shoot her as Danny told you?

A No. I didn't do that.

Q So then, what happened?

A Then she started passing me the money.

Q Who?

A The teller. And I stuck it in my left side of my jacket and after I got the money, I left and got out of the bank and rode the bike to Gold... Circles.

Q You rode the bike?

A Yes, to Gold... Circles.

Q When you got to Gold... Circles, what did you do with the bike?

A I aprked it between some shopping carts.

Q Do you recall which side of the Gold... Circles that was on?

A It was on the side next to the highway or thruway.

Q Yes, the Portland Avenue side?

A Yes, the Portland Avenue side.

Q How about in relation to the side, was it closer to the side bank or the opposite side of the bank?

A It was the opposite side of the bank.

Q What did you do next?

A Well, after I got off the bike and I went in the store and I couldn't find Danny and Gene, I couldn't

find them right away, so I was looking around and finally Gene came up and said, "Did I do it" and I said, "Yes." He said, "Give me the money." So I gave him the money and then he left.

Q You gave Gene the money?

A Yeah.

Q Did you give him all the money?

A I thought I did.

Q At the time -- Well, did something happen that same day to make you realize you didn't give him all the money?

A Danny had come back and asked where the rest of the money was at.

Q Let's see if I understand this. The first time after the robbery, the first person you saw was who?

A The first person I seen was Gene Smith.

Q What did you do with Gene Smith?

A I gave him the money.

Q And was Danny Rucker there this first time when you saw Gene Smith?

A He was there but I didn't see him until a couple of seconds later.

Q Then the next person you saw was who that you knew?

A The next person I seen. I seen Danny and after that they had left, then Danny came back again and he asked me for the rest of the money.

Q Now, when Danny came back, was Gene with him when he asked for the rest of the money?

A No. Gene was not with him.

Q Did you give Danny the rest of the money?

A I was going to but then he looked around and he said, "No, not here." He said, "Give the rest of it when I go back to his house."

Q What is the next thing that happened?

A Well, after that, Danny left and then I had to find where the bathroom was because Danny didn't find it, so I had to find the bathroom. I found it and I went into the bathroom and I took my jacket off and took my hat off.

Q What did you do with the jacket and the hat?

A I put it in the shopping cart outside of the bathroom, the mens bathroom.

Q Then what did you do?

A Then I went out of the store and I went to buy me a pair of pants and shirt.

Q Did you buy a pair of pants and shirt?

A No. I didn't.

Q What happened?

A I got caught.

Q Caught by who?

A The police.

I don't know who it was; the Irondequoit, what-ever.

Q Did they arrest you?

A Yes, they did.

MR. WELSCH: Mark these pieces of Government's Exhibits 7 and 8 for identification.

THE COURT: Mr. Welsh, while they are looking at that, may I look at Exhibit 5 for identification, please. I have three of them here, they are for identification. There is no need for the jacket, 4 and 6.

Q Mr. Brown, I am going to show you what has just been marked for identification, United States Government's Exhibit No. 7 and ask you to tell the Ladies and Gentlemen of the Jury, have you seen those glasses before?

A Yes, I have.

Q Where did you see those glasses before?

A I seen them. Danny gave them to me from his house.

Q On what date did he give them to you?

A It was the date of the ribbery.

Q Did you wear those glasses when you were in
the bank?

A I don't think I had them on.

Q Did you have them with you?

A Yes, I did.

MR. WELSCH: I would like to take a look
at Government's Exhibit No. 8 for identification.

Q Have you seen that cap before?

A Yes, I have.

Q Where have you seen that before?

A The day of the robbery, Danny gave it to me
to wear.

Q Did you wear that cap that day of the robbery?

A I think I had the cap on. I had it on.

THE COURT: Are you offering these various
exhibits?

MR. WELSCH: Well, I am going to offer them
now.

THE COURT: Now or at some later date?

MR. WELSCH: I just want to make sure that I
have -- Well, Gentlemen, I will offer them now, your
Honor.

THE COURT: Is there any objection, counselor,

to 3, 4, 5 and 7 and 8.

MR. LARIMER: No objection to 7.

THE COURT: I guess No. 6 is not being offered.

MR. WELSCH: I am not going to offer 6. I
am just offering --

THE COURT: 3,4,5,7 and 8.

MR. WELSCH: Yes, your Honor.

MR. WOLFORD: One moment, your Honor.

THE COURT: Three is the army jacket, 4 is
the metal cutter, 5 is the note, 7 the sunglasses
and 8 is the ski cap according to my notes.

There are no objections, then it will be
received, 3,4,5,7, and 8.

(Government's Exhibits 3,4,5,7, and 8
received in evidence)

Q Well, what did you do with the rest of the
money?

A Well, I couldn't do anything with it.

Q Did the police take it from you?

A Yes, they did.

Q Now, Mr. Brown, when was the first time any-
body in law enforcement asked you what you knew about an
attempted robbery at the Marine Midland Bank?

A The first time anybody asked me about that

was Thursday.

Q Thursday, when?

A Of this past Thursday.

Q Do you remember participating in a robbery in May of 1976 or an attempted robbery of the Marine Midland Bank at Hudson Avenue?

A Yes, I do.

Q Who was with you in that attempt?

A It was me and it was Bobby and Danny Rucker.

Q Do you recall whether or not there was any conversation prior to the attempt of the bank robbery with Danny Rucker or Bobby?

A Yes. Danny had told us that to go up here and that Bobby was supposed to come in and I was supposed to be his lookout.

Q Bobby was supposed to go in or you were supposed to go in?

A Well, the way, you know, the way I got it was that Bobby was supposed to go in because Danny told, you know, Bobby to go in.

Q Did anybody go in?

A Bobby did.

Q Did he get any money?

A No, he didn't.

Q Mr. Brown, do you shoot drugs?

A No, I don't.

Q Now, I want you to think back to September 29th, 1976. You testified about that conversation with Mr. Rucker and Mr. Gene Smith on September 29th. At that date, September 29th, did you have any criminal record at all?

A No, I didn't.

Q How much time did you spend in jail on this charge?

A Two months.

Q I have no further questions, your Honor.

THE COURT: Mr. Larimer, do you want to cross examine?

MR. WOLFORD: Yes. Is it all right if I go first?

THE COURT: As long as you work it out between yourselves. Normally, he would go first, the first named defendant.

MR. LARIMER: We worked it out between ourselves.

THE COURT: All right.

CROSS EXAMINATION BY

MR. WOLFORD:

* * * * *

gun, that is your testimony. Is that correct?

A Yes, sir.

Q Was there a reason why you chose not to bring a gun?

A Yes, there was. Because I didn't want to be involved with no gun.

Q Well, I take it that you objected to the use of guns?

A Yes. I didn't want to use no gun.

Q Did you ever see Ira Adams about the use of a gun when you walked into that pizzeria in Lyell Avenue?

A I didn't know he had it until it was too late.

Q Now, you have identified a note here, Exhibit 5A as I recall, as being a note you received that morning of the robbery. Now, Mr. Brown, did you read that note that morning or was it placed in the envelope and given to you?

A This note, well, I read the note.

THE COURT: You had or have not read the note?

THE WITNESS: I read the note.

Q Did you place the note in the envelope?

A No. No I didn't.

Q It was already placed in the envelope when

it was given to you.

A When I read the note, I gave it, the note, back to Gene and he placed it in the envelope.

Q Did you add anything to the note ?

A This note right here? No., there was a note before this one, sir.

Q There was a first note and then a second note; is that correct?

A Yes, sir.

Q You recall what the first note said?

A Well, the first note has something to do with "Give me all your twenties" or something like that.

Q Q As I understand it, Mr. Brown, you didn't actually put the sunglasses on when you walked into the bank; is that correct?

A Yes, sir.

Q Was there some reason why you didn't?

A I had forgotten. I was just nervous and scared. I forgot to put them on.

Q Where did you put the sunglasses?

A I believe I put them either in my pants pocket or my -- I believe in my pants pocket.

Q And --

A I believe that was where I put them.

* * * * *

V I R G I N I A S. A L L E N , called

as a witness, having been first duly sworn by the Clerk
of the Court testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Miss Allen, keeping your voice up good and
loud and speaking to the microphone, would you tell the
ladies and gentlemen of the jury how you are employed?

A I am assistant vice-president and branch
manager for the First National Bank of Rochester.

A What particular branch are you the manager
of?

A The Georgetown Plaza office in Irondequoit

Q Exactly where in Irondequoit is that
located?

A 1000 Ridge Road East between Carter Street
and Portland Avenue on the north side of Ridge Road.

Q Do you know where Gold Circle Store is in
relation to your bank?

A It is visible, you can look to the corner of
Portland and Ridge.

Q Which side of Ridge Road is Gold Circle
Store in?

A South.

Q Miss Allen, were you so employed September 29,

A Yes, I was.

Q At that time, was the First National Bank insured by the FDIC?

A Yes, we were.

Q Did you bring some document with you today to show that your premiums have been paid up?

A Yes.

THE CLERK: Government's Exhibit 10, marked for identification.

Q What is Government's Exhibit number 10?

A Okay, its a computation of the assessment for the FDIC, and our charge from the period June 30, 1976 through December 31.

MR. WELCH: May I have this marked as Exhibit 10-A, please?

THE CLERK: Government's Exhibit 10-A marked for identification.

Q Would you tell the Court and jury what Government's Exhibit 10 is?

A A xerox copy of the assessment per computation and also a xerox copy of the voucher check that we issue to pay the bill.

Q A xerox copy of the Exhibit 10-A?

A Yes.

MR. WOLFORD: Would your Honor care to see these?

THE COURT: No, show it to counselor.

MR. LARIMER: We won't mind if the type of evidence produced -- I think both Mr. Wolford and I are both willing to stipulate this bank is insured by the FDIC.

THE COURT: All right. 10-A received into evidence. You may take 10 back.

Are you finished?

MR. WELCH: If your Honor please, I want to ask one more question.

Q Miss Allen, in the bank robbery -- in September 29, 1976, did you conduct an audit to determine how much was taken in that bank robbery?

A Yes, I did.

Q How much was taken?

A \$1,063.

MR. WELCH: I have no further questions.

Thank you, your Honor.

THE CLERK: Government's Exhibit 10-A marked in evidence.

(continued on next page)

* * * * *

THE COURT: You may step down.

MR. WELCH: Your Honor, we call Desmond Hall
to the stand.

D E S M O N D H A L L , called as a
witness, having been first duly sworn by the Clerk of the
Court testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Hall, keep your voice up good and
loud and talk right into that microphone.

Would you tell the ladies and gentlemen of the jury
where you lived in September of 1976?

A Well, I lived at 342 Seneca Manor Drive.

Q In September of 1976, did you know Danny
Rucker?

A Yes.

Q Do you see him in the courtroom today?

A Yes.

Q Would you tell the ladies and gentlemen of
the jury what he is wearing?

A He is wearing?

Q Just a shirt?

A A plaid shirt.

Q What color coat or jacket?

A Blue.

Q And plaid or striped shirt?

A Striped, I mean.

MR. WELCH: Let the record reflect he has identified the defendant Danny Rucker.

Q Where did Mr. Rucker live in September of 1976?

A Across the street from me at, I think, 341 Seneca Manor Drive.

Q Right across the street?

A Yes.

Q Did you know the defendant Genie Smith?

A I did know Genie, yes.

Q Do you see Genie Smith in court?

A Yes.

Q Would you point him out to the ladies and gentlemen of the jury?

A He is the one with the white, like flowers or something on his sweater and a black shirt.

MR. WELCH: May the record reflect he had identified the defendant Genie Smith.

Q Where did the defendant Genie Smith live in September?

A Across the street from me, also, next door to Danny Rucker, it think, at 237 or 235, something like that.

Rucker and Smith lived right next door to each other?

A Yes.

Q I want you to think back to September 29, 1976 in the early afternoon.

Did you see Danny Rucker on that date?

A Yes, I did.

Q Where did you see him in the afternoon?

A I seen him running through Two Guys parking lot.

Q Now, where is Two Guys in relation to where you live?

A Right up the street from which I live.

Q Right up Seneca Manor Drive?

A Yes, Seneca Manor Drive.

Q And you said you saw him doing what?

A Running.

Q Which direction was he running?

A Toward Hudson Avenue and down toward Seneca Manor Drive.

Q Was anyone with him?

A Yes.

Q Who was with him?

A Michael Smith.

Q Who is Michael Smith?

A Virginia Smith's brother.

Q What was Michael Smith doing?

A He was running also.

Q Which direction was Michael running?

A Running towards Hudson Avenue towards Seneca Manor Drive.

Q Was anybody else running with them?

A I didn't see anybody else.

Q What did you do at that time?

A Well, I was on my way from school that time, so I kept walking , so when I got home , I went across the street to Michael Smith's house and then I went down the basement. After they let me in and I see them down in the basement counting large sums of money.

Q Who else was there?

A Danny Rucker and Michael Smith and Gene Smith.

Q Did you see Genie Smith running across Two Guys parking lot?

A No, I didn't.

Q When was the first time you saw Genie Smith that day?

A When I went into the house and seen him in the basement.

Q Who was counting money?

A Michael was counting the money and all of them was down there, but Michael was the one counting.

Q Did you have any conversation when you were there?

A In the basement, no I didn't , but when I left out the house, then Michael Rucker -- I mean Danny Rucker and Eugene Smith came outside behind me and asked me if I would go up to Gold Circle and get a bicycle. They would pay me a dollar and I said yes, and then I said no.

Q Did they tell you what bicycle they wanted you to get?

A Yes. Danny's sister's bike.

Q And they told you it was where?

A Up at Gold Circle.

Q Did they explain why they wanted you to get it?

A At first, no.

Q At some later time, did they explain?

A Well, not to me, I overheard what they were saying, but then they said, well, we got --

MR. LARIMER: Objection unless it was made in the presence of this witness.

THE COURT: Did you overhear who said --

Excerpts of Testimony of Desmond Hall.

THE WITNESS: I overheard Michael Smith and
Danny Rucker say.

THE COURT: I will allow it.

Q Well, what did you hear them say?

A That we got to get somebody to go up there
and get that bike, and to get a pipe.

Q A pipe?

A A pipe.

THE COURT: From whom?

THE WITNESS: Edward Brown.

Q Well, that is not what you first said.

What did you say before that?

A Before that?

Q A pipe from whom, did you call him Edward
Brown? What did you call him?

A Bigs, that is what everybody else calls him.

Q Did you see that money?

A Yes, I did.

Q What did it look like?

A New.

Q How do you know it looked like new money?

A When they counted it, they had to wet there
fingers, because it was like stuck together.

Q Now, you just said they?

A Yes.

Q Who was counting the money?

A Well, Michael was counting it, but all three of them were down there.

Q Did you see what they did with the money?

A Yes. After they finished counting it, they took it and put it on top of the furnace.

Q Instead of saying they, I'm sorry -- my question was improper.

What happened to the money after you saw it being counted?

A Michael put it on top of the furnace, but not the furnace, but one of the pipes that lead to the furnace.

A Did you see Genie Smith do anything after that?

A After Michael hid the money on top?

Q Yes.

A No, I think he came upstairs, he came upstairs and he left out the house.

Q Did you see Michael do anything after he hid the money above the heater?

A Yes, I did. He came upstairs and he was shutting all the doors and locking the windows, and then he went upstairs and came back downstairs with a different

set of clothes on, and washed his hands and put lotion on and stuff like that.

Q Do you know a person by the name of Pops?

A Yes, I do.

Q Who is Pops?

A Well, his real name is David Jackson. I know him from playing basketball and football and messing around with him a lot of times.

Q At any time while you were down there in the basement, did Genie Smith say anything to you or the other people?

A Not that I know of.

MR. WELCH: I have no further questions,
your Honor.

(continued on next page)

* * * * *

Q Now, you say money was being counted out. Who was it that was actually counting the money?

A Michael Smith.

Q Not the defendant, Gene Smith that you identified here?

A Well, both of them was counting it, but when I had seen it, Mike was counting and then Gene was counting it. I guess they were trying to divide it up or equally or something.

Q Was all the money placed up in one particular place?

A Yes, it was.

Q How was it that you got down into the basement. Did you just walk in?

A Well, I came in and I knocked on the door and they let me in like they usually do.

Q Was anybody else at the Smith's house that day that you recall?

A Might have been someone else, but I didn't see. There might have been his sister upstairs but I didn't see.

Q Do you recall anybody else other than the gentlemen you already mentioned?

A No.

* * * * *

MR. WOLFORD: Whether he adopts it or not is irrelevant.

MR. WELSH: I think it's relevant, but in view of what is in my notes in this case I have no objection if Mr. Wolford sees my notes. But I don't think that is the law.

THE COURT: Well, we have always construed the 3500 material, rightly or wrongly, I don't know, I know our United States Attorneys turn over everything, but they don't take any notes.

MR. WELSH: I will be happy to give Mr. Wolford a copy of my notes, but I do want to note your Honor, that my notes have been marked up in the courtroom as the witness changed his testimony and originals.

THE COURT: You don't have to hand him anything you changed in the courtroom.

MR. WELSH: The witness changed his testimony from what I took down on Friday and I will provide the originals that will show different pen and pencil.

MR. WOLFORD: As long as you give me the notes.

THE COURT: Somebody said I think, two people said they were going to get me some request to charge by this morning, I have been waiting.

MR. WELSH: I was working, continuing to work on that brief and Mr. Houlihan said he would draw up

some charges. I have not talked to him. I would like to ask him and if I do have request to charge I will give them to counselor and your Honor.

MR. WOLFORD: I have not proof of this, but hopefully there are not too many errors. I will review it and see whether there is.

MR. LARIMER: I would like an opportunity to review Mr. Wolford's request to charge. There may be some duplication in my request. I have reviewed some jury instruction books that I would like to make requests from and some additional instructions depending on what your Honor's feelings are if my motion for judgment of acquittal on at least one count of the indictment, depending on your Honor's ruling on that I may have additional instructions.

THE COURT: Do you have a memo on that question?

I think I know where you are going, but I am not sure.

MR. LARIMER: I do not have a memo of law your Honor, but I have some cases.

THE COURT: If you have some cases I would appreciate you giving me xerox copies of those cases. What I have read on the subject I may have some doubt about it.

MR. LARIMER: Doubts which way?

THE COURT: About your motion, I think I know what you are basing it on. You have not expressed yourself on the subject.

MR. WELSH: Do you want to tell us what it is so we can provide the court with cases?

MR. LARIMER: Well, the Government's case is not completed yet.

THE COURT: I am not going to question you. I am just saying maybe you are asking for an instantaneous ruling at such time as I may not have the same benefit of the knowledge of the law that you purport to have. Try to phrase that --

MR. LARIMER: I will attempt to get something to the Court on that.

THE COURT: I can get what I think you are doing, but this is a pretty technical statute that we are dealing with as you know and it's not like the first paragraph of the statute. It's very different.

The first paragraph of the statute, the elements are quite different. But I think that is what you are driving at. I am not sure.

MR. LARIMER: I think so. I don't know what else Mr. Welsh has in store for us. My motions and thoughts might be premature.

MR. WELSH: I would like to discuss one other

witness your Honor. I propose your Honor to call to the witness stand Nora Cameron who is named in this conviction record of Mr. Rucker as the victim of the robbery. In addition, I propose offering into evidence the original of this certified exemplified copy of the conviction of the statement of the two co-conspirators, but with just Mr. Rucker's statement, if defense counsel has no objection to my altering what I received from the Monroe County Clerk's Office. I know he has objections to it going in, but --

THE COURT: When we cross that bridge, I think I am not quite sure, but the significant thing that I have trouble about is the necessity of introducing the conviction. If he introduces these admissions --

MR. WELSH: I think your Honor since we heard so much allegations of crime that Mr. Rucker might very well take the stand and deny he was involved in that. And his admission by his guilty plea seriously detracts from that.

THE COURT: If he takes the witness stand you don't have to worry, but at the moment he has not taken the witness stand.

MR. WELSH: The other problem your Honor is --

THE COURT: All you have to do is prove by clear and convincing evidence upon the preponderance

of the evidence that he committed a similar act.
You don't even have to prove it beyond a reasonable
doubt.

MR. WELSH: But his statement does not include
reference to this bank just the Marine Midland Bank
on Hudson Avenue.

THE COURT: How many are there?

MR. WELSH: I have no idea. The indictment
charges --

MR. LARIMER: I don't know how many Marine Mid-
land banks there are but I have a continuing --

THE COURT: I am trying to look at it from your
standpoint because his conviction might stand somewhat
differently.

MR. LARIMER: My problem is I don't think the
admission indicates a common scheme or plan like they
allege in the case.

THE COURT: It's the same bank, practically the
same time.

MR. LARIMER: According to the statement he
didn't even know the robbery was happening. He was
outside and in the car and his brother went in and
did this crazy thing. I don't know how the Government
from that could prove common scheme or plan. There
is no testimony of agreeing together or meeting together

or planning this plot.

MR. WELSH: Without the statement of the co-conspirators that is why I need to put it in as admissible to prove that this man admitted it was intent to rob the bank, the conviction --

THE COURT: I guess you are not going to concede it?

MR. LARIMER: Concede what?

THE COURT: That he committed this robbery.

MR. WELSH: I tendered to the Court the original of that before we altered it. I would think we can delete from the original the co-conspirator's statement.

THE COURT: Yes.

MR. WELSH: But I don't want to do that until defense counsel can see it and raise the objection and I will give it to him. Now he has seen a copy of it.

MR. LARIMER: Do you want to keep out the co-defendant's testimony?

THE COURT: Do you want it in?

MR. WELSH: If there is no objection.

THE COURT: I didn't think they were properly admissible. They are not subject to cross-examination.

MR. LARIMER: I don't want them in and I don't

Discussion.

think Mr. Rucker's statement is admissible either. But I expressed myself on that before. I have no objection to removing the co-conspirator's statement.

MR. WELSH: If your Honor pleases, I am showing Mr. Larimer the co-conspirator's statement which I could simply cut out of here with scissors and there will be no question.

THE COURT: He says he wants them out. So, there is no problem. Does Mr. Wolford want them out? You don't object do you?

MR. WOLFORD: No, I don't.

MR. WELSH: I will do that tonight, and propose to offer that tomorrow.

MR. LARIMER: Your proof is that you will offer that certified copy with Mr. Rucker's statement as well as some witness from a bank or something?

MR. WELSH: Nora Cameron to identify herself as where she was working at the day she was robbed by Mr. Rucker. She will not identify the defendant Rucker.

MR. LARIMER: What is the purpose of her testimony?

MR. WELSH: Her testimony simply says that it was a Marine Midland Bank on Hudson Avenue and does not identify the bank. The condition does. It identifies the victim.

THE COURT: If you get the conviction in what do you care about?

MR. WELSH: It just identifies the victim and I need the victim to see where she is working.

THE COURT: All right.

MR. LARIMER: I object to his entire proof and as I expressed before it is prejudicial and should not be admitted.

THE COURT: No question and so is everything else that has been happening in the last two days.

MR. LARIMER: In the sense that it should not be admitted the prejudice outweighs----

THE COURT: Now you're both assigned counselors and experienced counselors and I realize, but the evidence here is by our standards down where I come from overwhelming. And I don't know. I am not pushing and I don't want statements from you, but I have always been of the belief that you should, maybe the clients never appreciated that, but --

MR. LARIMER: I have fully advised my client of his rights in the matter.

THE COURT: All I can do is make the comment.

MR. WOLFORD: Maybe I missed the point. You prefer discussing these things in chambers?

THE COURT: I don't want you to discuss anything.

I don't want any comments from you. I am sure you have difficult problems on your hands and I am not trying to suggest anything to you. I am just pointing out what I think must be obvious to everybody and that you have a rough case.

MR. WOLFORD: Right.

THE COURT: I am here all week. I have nothing else to do. I might as well sit here and have a -

MR. WOLFORD: I disagree.

THE COURT: You don't want to say anything in front of the prosecutor?

MR. WOLFORD: Where I come from, your Honor, this is not an overwhelming case as far as my client is concerned. I will stand by that and see what happens.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
 -against- : CR 76-181
DANIEL LEE RUCKER and :
EUGENE SMITH, :
 :
 Defendants. :
 :
-----X

United States Courthouse

October 26, 1977

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

10/27/77
CLERK OF COURT
WESTERN DISTRICT OF NEW YORK
ALBANY, NEW YORK

MR. WELCH: We have done it both ways in recent months.

THE COURT: Well, I don't know how many criminal cases I have handled in my years, but there has been only one jury that I have sequestered. It was a lengthy criminal anti-trust trial, Hobbs violation alleged. And this is the only jury that I used to keep until 7:00 o'clock in the evening and then send them uptown for a few days.

This fellow has no phone I take it?

MR. LARIMER: No, he does not. That is the unfortunate part.

THE COURT: Wasn't he the one on the first day he said he would be in your office at 8:30 or something and he didn't show up until 11:00 o'clock, am I wrong?

MR. WOLFORD: He has not kept the schedule the way I would have liked him to have kept it.

MR. WELCH: The Government's request to charge, as I indicated yesterday, I asked my partner to do those and as your Honor knows he was engaged in something else and they are not done. So, we do not have a request to charge.

THE COURT: It is all right with me. I read

with number one. I think it's perfectly all right. I am inclined to give it. Number two, I will give. Number three I will give and I will give a little more on comprehensive reasonable doubt. This is pretty much Devitt and Blackmar. I will give an aiding and abetting charge. Now, I would give a standard accomplice charge, fairly standard. I am disinclined to give the charge you have outlined here with the exception of the last paragraph on page six and over on the top of page seven. The Gonzalez case does not stand for that proposition as I read the Gonzalez case. But I think it is a proper charge.

MR. WOLFORD: I am a little confused, your Honor. Did you say number four which begins, referring to the testimony of Edward Lee Brown would be given?

THE COURT: I will give an accomplice charge, but not that one. It has to be weighed with great care. And I will give the discredited and impeachment charge. But I think now as between number four and the first paragraph on the top of page five, that is the first paragraph on the top of page five and the last paragraph on the bottom of page six, I think the more accurate expression of the rule is in the

last paragraph, the bottom of page six. I think there is a recent Second Circuit decision. I couldn't recollect it. So, I thought maybe the Government might know, but that is the Second Circuit decision which I think states the rule as I stated here. I went looking to try to find it --

MR. WOLFORD: Let me try to find that.

THE COURT: This is a Second Circuit decision which is fairly recent. The one that you proposed at the bottom of page six and the top of page five, I think the one at the bottom of page six, particularly in light of this case, may be more accurate. So, I don't know.

MR. WOLFORD: Your Honor, we are dealing here, are we not, with not only a witness who has been immunized, whether formerly or informally, which was stated in the Grand Jury by Mr. Houlihan that this witness had immunity, but we're also, of course, dealing with an accomplice. And I am wondering whether or not it is appropriate to give both the statements with reference to --

THE COURT: I don't think you are entitled to both. You are entitled to one or the other. I don't think you are entitled to both. You see the problem is he has already procured his own freedom.

MR. WOLFORD: Well, of course there has been testimony now for the first time that he was involved in another bank robbery which he did not testify to before the Grand Jury.

THE COURT: There is no indication from the prosecutor that he has procured his freedom with respect to that or has been any suggestion one way or the other that he has testified one way or the other because I think he got his Federal immunity some time back, that is what I am suggesting.

MR. LARIMER: He is still on probation though.

THE COURT: You cannot provoke the probation --

MR. LARIMER: If they feel he perjured himself --

THE COURT: If he did that he could be prosecuted regardless.

MR. LARIMER: The point is that he believes that he has to, in our view, continue the story that he has concocted in our view.

THE COURT: Well, there is this case, this case does set forth the proper language. I couldn't think of it. I guess by calling my chambers I might be able to unearth it.

MR. WOLFORD: I will try to unearth it myself.

THE COURT: It is in your interest and the

Government's interest.

MR. WELCH: I will attempt to find it too.

THE COURT: It's in all our interest to get the right charge.

MR. WOLFORD: You are speaking of a Second Circuit case that came down probably in the last year?

THE COURT: It is my recollection that Mr. Paul Warburg, I think, I can find him if I just call down there and call Mr. Warburg, expressed it to me on the last case I tried down there. And I was about to give it. He clipped out the case and he said look Judge, if you don't give it to me I am going to get it reversed. So I gave it. I was so impressed by it that I gave it. After I had been through with my charge I gave it.

MR. LARIMER: In the Court's charge on aiding and abetting, will the Court give language similar to the language on page four?

Three of Mr. Wolford's requests?

THE COURT: Mere presence?

MR. LARIMER: Yes.

THE COURT: Sure.

MR. LARIMER: It must be a participant, not a merely knowing spectator.

THE COURT: Yes.

MR. LARIMER: I also request, and I have not yet written it, but the standard instruction of the perjury. One who admits he has committed perjury on his testimony should be viewed with special precaution. I think Mr. Brown has indicated.

THE COURT: Well, does one perjure oneself when one makes an unsworn statement? He didn't make it to the Federal officer, it is not virtually --

MR. LARIMER: An admission on the sense that he gave a statement directly inconsistent with what he is now testifying to.

THE COURT: That I will cover in my standard charge, you know, where he has testified falsely and so forth. The special perjury charge I think is not applicable where you just have a thousand one one statements.

MR. LARIMER: Well, even in his Grand Jury testimony there were failures to mention --

THE COURT: He said that is just a failure of recollection. That is not perjury. I would be disinclined unless you could show me some authority to give it that kind of treatment. I will give the standard, you know, if you find that he testified falsely or inconsistent statements, that may or may not lead the jury to discredit the testimony of a

witness in whole or in part.

MR. LARIMER: I also believe that there is an instruction on the testimony of an informer in Devitt and Blackmar, 12.02. He talks about an informer, one who has received immunity. And I think Mr. Brown and Mr. Rivera both fit into this category. Not only are they accomplices, but in a sense very truly informers. They received much benefits from doing what they have done and should be classified as such.

THE COURT: I think this is what the Second Circuit case is saying. They are not truly informers in the informer sense. They are informers in the accomplice sense which is giving something in exchange which I think is a little different. Informers, as you former District Attorney's know, go out and make a deal with the Government to inform on other people, but may or may not, but probably is not an accomplice except to the sense that the Government requires him to be an accomplice, at least from my conception. Let's see what this case says, because I think it states the rule on how it should be phrased. I will take a few minutes. I will go make a call and see if I can resolve that.

(At this point there is a short recess.)

MR. WOLFORD: Your Honor, may I be heard?

* * * * *

to state Mr. Hall that you didn't make any mention of Eugene Smith or Gene Smith being present in the basement apartment when you were interviewed by the police officers regarding this matter?

A Did I make any comment of him being in the basement when I talked to the police?

Q Yes.

A At that time?

Q Yes.

A No. I didn't.

MR. WOLFORD: I have no further questions.

MR. LARIMER: Your Honor, would I be allowed to ask one or two additional questions?

THE COURT: After Mr. Welch.

MR. LARIMER: I would like to reopen my cross-examination.

THE COURT: I said after Mr. Welch.

RE-DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Hall, on Friday afternoon when you were talking with Agent Carney about what you recall from September 29, who did you tell Agent Carney you saw counting money on that date?

MR. WOLFORD: I object your Honor. It is im-

proper.

THE COURT: Overruled.

Q Go ahead answer the question. Who did you tell Agent Carney you saw counting money in the basement?

A Eugene Smith.

Q Anyone else?

A And Michael Smith.

Q You told him you saw both of them counting money?

A Right.

Q Who did you see counting money, what is your recollection now? Who did you see counting money?

A I seen both of them counting money. But it seems like Gene had more money because his was thicker.

Q In September of 1976 what time did school get out on Wednesdays?

A One thirty, one twenty.

Q Is that any different from other days?

A Yes. Like Mondays and Tuesdays, Thursdays and Fridays lets out at two twenty.

MR. WELCH: Would you please mark this.

THE CLERK: Government's Exhibit 12 marked-for identification.

MR. WELCH: May I give the Exhibit to the Court

Excerpts of Testimony of Desmond Hall.

and ask the Court to take judicial notice that the date September 29, 1976 was a Wednesday.

THE COURT: Yes.

MR. WELCH: May 12, 1976 was a Wednesday and May 14, 1976 was a Friday.

THE COURT: Yes, May 12th was a Wednesday and May 14th was a Friday.

MR. WELCH: Thank you your Honor. I have no further questions. May I offer that into evidence at this time?

THE COURT: Is there any objection?

MR. LARIMER and MR. WOLFORD: No.

THE COURT: To be received. Mr. Larimer

RE-CROSS EXAMINATION :

BY MR. LARIMER:

Q Mr. Hall, you testified yesterday that on September the 29th you saw Mr. Rucker and Mr. Michael Smith running near the Two Guys Parking Lot, is that correct?

A Running through it?

Q Running through the Two Guys Parking lot.

A Yes.

Q Now the Two Guys shopping plaza that is different from the Golden Circle Shopping Center, is it not?

A Yes it is.

Excerpts of Testimony of Desmond Hall.

Q And the Two Guys Shopping Center is that located on the corner of Hudson Avenue and Ridge Road?

A I think it is, yes.

Q Where is the Two Guys Shopping Plaza or the Two Guys store in relation to where Mr. Rucker lived, if you know?

A In relation you mean how far?

Q Yes. Was it across the street, a mile away or a block away?

A No it was not that. It was about, it didn't take more than five to six minutes to walk from the store to the apartment.

Q That is from the two guys store?

A Two Guys store.

Q Now the Gold Circle Store that is further down Ridge Road, isn't it?

A Yes.

Q Toward the east?

A Yes.

Q Isn't that about three or four blocks down Ridge Road away from the Two Guys Plaza?

A It depends on which way you go.

Q How far is it from the Two Guys Plaza to the Gold Circle Plaza?

Excerpts of Testimony of Desmond Hall.

A I never counted it. I wouldn't know.

Q Well why don't you think for a minute. Is it four blocks?

A It might be.

Q How many street lights are in between there, do you know?

A No because I very seldom go there.

Q Go where? Gold Circle?

A Gold Circle.

Q But you do recall that it's not next door to the Two Guys Plaza?

A Right.

Q Do you recall ever walking from the two guys Plaza down to Gold Circle?

A Yes.

Q Can you give us any estimate as to how long, if you can't give us an estimate of the blocks, how far it is from the Two Guys to the Gold Circle Plaza?

A Well I never walked down the street. I would always cut through Two Guys and go out through the back exit and climb over the fence. There is Gold Circle right there. You cut through the apartments.

THE COURT: That is the short cut.

THE WITNESS: The short cut.

THE COURT: You can't give us any estimate in terms of feet or blocks as to how far - -

THE WITNESS: No I can't.

THE COURT: (continued). The distance is?

THE WITNESS: No I can't.

Q You said yesterday that Mr. Rucker and Mr. Michael Smith were running near the streets. Which street was that, Hudson and Ridge Road?

A Along Hudson Avenue.

Q Hudson Avenue?

A Hudson Avenue.

Q How close were they to Hudson Avenue if you recall?

A Yesterday I said about twenty or thirty feet.

Q Now this parking lot that you saw them run through is that right on the corner of Hudson and Ridge Road?

A Right on the corner.

Q Is there a store right on the corner?

A No the store is farther back up in the parking lot.

(Continued on next page.)

* * * * *

Excerpts of Testimony of David Michael Grossi.

A It was the same one but put different ways.

MR. WOLFORD: I have nothing further.

THE COURT: Okay, you may step down.

MR. WELCH: The United States calls David Michael Grossi.

D A V I D M I C H A E L G R O S S I , called as
a witness herein, having been sworn by the Clerk of
the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Grossi, will you speak into that microphone
please and tell the Court and jury how you are employed?

A As a criminal investigator for the town of
Irondequoit Police Department.

Q Were you so employed in September of 1976?

A Yes, I was.

Q On September 29, 1976, in the early part of
the afternoon did you have occasion to respond to the Gold
Circle Store in Irondequoit?

A Yes, I did.

MR. WELCH: Would you please mark this.

THE CLERK: Government's Exhibit 13 marked
for identification.

Q Mr. Grossi, I am handing you Government's

Exhibit No. 13. Would you examine that for a moment please?

A Yes, sir.

Q Have you seen that before?

A Yes, I have.

Q Where did you first see that?

A I first saw it as I removed it from the pocket of Edward Brown in Gold Circle Department Store on September 29, 1976.

Q When you removed it from Mr. Brown's pocket, what did you do with it?

A I maintained it into my possession until I turned it over to our evidence technician.

Q Who is that?

A Officer Gerard Bates.

MR. WELCH: I offer Government's Exhibit 13.

MR. LARIMER: No objection.

MR. WOLFORD: No objection.

THE COURT: To be received.

MR. WELCH: I have no further questions.

THE CLERK: Government's Exhibit 13 marked in evidence.

THE COURT: How much is in there?

MR. WELCH: \$365. Would you like the witness to verify that?

THE COURT: I just want to make sure.

THE WITNESS: \$365, your Honor.

THE COURT: All right.

Are there any questions, Mr. Larimer?

MR. LARIMER: Can I have the Court's indulgence
for a moment?

THE COURT: Certainly.

CROSS-EXAMINATION

BY MR. WOLFORD:

Q Mr. Grossi, where was it that you removed the
money from Mr. Brown?

A His righthand pocket, pants pocket.

Q Was this inside a building or outside?

A Inside the Gold Circle Department Store.

Q Do you recall about what time it was that you
removed that money from Mr. Brown?

A Approximately 1:55.

Q Do you have any records or anything in the
possession of the Government that might refresh your memory
as to the time or is that your best recollection?

A To the best of my recollection it was approx-
imately 1:55 p.m.

Q You arrived at the Gold Circle Store in an
automobile, I assume?

A That is correct.

Q Do you recall whether you were the first police car on the scene?

A I don't believe I was the first police car on the scene.

Q When you entered the Gold Circle Store were there other police officers in the store?

A Not at that time.

Q Do you recall entering the store with a Ms. Vanhore, I think it is, a blonde girl?

A No, sir, I entered the store with two other police officers.

Q Do you know which woman I am referring to?

A I don't believe so.

Q Did you have any discussion with a woman?

A No, sir.

Q At the Gold Circle Store?

A No, sir, I did not.

Q How long before you arrived at the store did you enter it?

A Three or five minutes after my arrival.

Q During those three or five minutes, do you recall whether other police cars were coming on the scene of the Gold Circle?

A I believe there were other police cars responding,

* * * * *

MR. WOLFORD: We will have to bring him back.

THE COURT: Yes. He does not have to stay
around too much.

MR. WOLFORD: All right.

(End of side bar discussion.)

CROSS-EXAMINATION

BY MR. LARIMER: (continued)

Q Well, Investigator, who was present when you
interviewed Mr. Hall?

A Myself and Officer Brace (ph).

Q Officer Brace is from the Irondequoit Police
Department?

A That is correct.

Q Did you take notes of that interview?

MR. WELCH: Objection.

THE COURT: Sustained.

MR. LARIMER: I have nothing further.

REDIRECT EXAMINATION

BY MR. WELCH:

Q Investigator Grossi, you told Mr. Larimer all
the exits were covered at Gold Circle Store. What does that
mean?

A The office is stationed at the entrance and
exit of the Gold Circle Store.

Q Doing what?

A Watching to ensure that nobody fitting the description of Mr. Brown exited the store prior to us entering.

Q At that point you had a description?

A That is correct.

Q Do you recall what the description was?

A Yes, sir.

Q What was it?

A Black male in his 20's. Approximately 250 to 275 pounds. Description of clothing: wore a green Army jacket, a red or maroon hat and a three or four day growth on his face.

Q So, the officers covering the door would stop only that person?

MR. LARIMER: Objection.

MR. WOLFORD: Objection.

THE COURT: Sustained.

Q What was the function of the officers covering that store?

A To ensure that nobody fitting that description exited the store.

Q How many suspects were you looking for?

MR. WOLFORD: I object, your Honor. I don't

think there is any question here that it is Mr. Brown.

THE COURT: No, I will allow the question.
There is only one, he has only described one person.

Q How many suspects were you looking for?

A At that time, one, sir.

Q Did you yourself see anyone else coming or
going from the Gold Circle Store at that time?

A No, sir.

Q Who actually made the arrest of Mr. Brown?

A Investigator Charles Martin and myself.

Q And yourself?

A That is correct.

Q You said you took the money at 1:55. Is that
when you made the arrest?

A Approximately 1:55 p.m., yes, sir.

Q Do you know when the bank robbery occurred?

A Shortly after 1:00 p.m., I believe.

MR. WELCH: I have no further questions. Thank
you, your Honor.

MR. LARIMER: May I have a moment your Honor?

THE COURT: Yes.

MR. LARIMER: I have nothing further, your
Honor.

MR. WOLFORD: Nothing further.

THE COURT: You may step down. You are under subpoena so you may not be discharged yet.

THE WITNESS: Yes.

MR. WELCH: The United States called Gerard Bates.

G E R A R D B A T E S , called as a witness,
having been first duly sworn by the Clerk of the Court,
testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Bates, would you tell the Court and the jury how you are employed?

A A police officer of Irondequoit.

Q Specifically, what is the nature of your duties as a police officer?

A I am on patrol and senior technician and in charge of the technician unit.

Q What is a technician unit?

A Primarily the gathering and preservation of evidence and investigation of crimes.

Q On September 29, 1976 did you have occasion to be at the Gold Circle Store at the corner of Portland and Ridge Road East?

A Yes, I did.

Q On that date, did you have occasion to see a

* * * * *

you to do?

A That is correct.

Q Government's Exhibit No. 9, a packet of money, is that in the same condition as when you first observed it?

A Yes, it appears to be.

Q The other money that you found -- strike that. The number of bills and the type of bills that are in this packet were the same as you observed when you photographed them?

A I have to look at my notes to be sure.

Q Do you have your notes with you?

A They are in our trial folder, if I can locate that.

MR. LARIMER: Mr. Welch, do you have that?

MR. WELCH: I don't know if they left it here or if Officer Grossi took them with him.

Q You don't have any independent --

MR. WELCH: He should be in the hallway.

Q You don't have any independent recollection as to what the amount of bills are?

A It should be \$15.

THE COURT: Fifteen American and how many Canadian --

THE WITNESS: No, three Canadian, two Canadian

and thirteen American.

Q Let me show you what has been marked for identification as number 17 and look at that. Does that refresh your recollection or help you remember what the amount of money was?

A Yes. Three Canadian and 12 American currency.

Q Is that what is contained in that packet?

A Yes.

Q This note, Government's Exhibit 5, was identified. Where was it to the best of your recollection that you received that note?

A Sir, I would have to refer to my notes. Again, I can't exactly state when I received possession of this.

Q I direct your attention --

A These are not my notes. They are on another piece of paper.

Q Well, directing your attention to number 17 for identification, in reference to the top three or four lines of that report, does that refresh your recollection as to where you received that note?

A No, sir. This only indicates the evidence that was taken into custody.

Q It does not indicate whether it was at Gold Circle or somewhere else?

* * * * *

Does your name appear anywhere on that piece of paper?

A No, sir.

Q Is that Calutie (ph) ?

A Yes, sir.

Q Was there anyone else, any other officer of the Ironedquoit Police Department involved with you in this bicycle transaction?

A No, sir.

Q Not an Officer Calutie (ph)?

A No, sir.

MR. LARIMER: I have no further questions, your Honor, at this time.

THE COURT: Mr. Wolford?

MR. WOLFORD: I have none, your Honor.

THE COURT: You may step down.

MR. WELCH: United States calls Nora Cameron.

N O R A C A M E R O N, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Miss Cameron, would you tell the Ladies and

Gentlemen of the Jury and the Court, how you were employed on January 15, 1976?

A I was a teller at Marine Midland Bank.

Q Would you keep your voice up and speak into the microphone?

A I was a bank teller at Marine Midland Bank.

Q Which particular branch?

A Hudson Avenue and the Two Guys Plaza.

MR. LARIMER: Objection. May we approach the bench?

THE COURT: I understand your objection. I will give the Jury a cautionary instruction.

Ladies and Gentlemen of the Jury, this testimony that is going to be given by this witness and I state possibly one or two exhibits that may be offered in connection with this, relates to a matter that is not specified in any of the counts of the indictment.

Count 1, 2, 3 and 4. Secondly, as I understand it, it relates solely to the Defendant Rucker, is that right, Mr. Welch?

MR. WELCH: That is right, your Honor.

THE COURT: And it is being offered for a very limited purpose, both this witness' testimony

and one or two exhibitits which I will alert you to if and when they are offered, and you are to take this testimony and those exhibits subject to the following instructions and bear in mind it pertains solely ot the Defendant Rucker.

The fact that an accused may have committed another offense or act at some time is not any evidence or proof, whatever, that at another time the accused committed the offense charged in the indictment even though both offenses are acts very like in nature.

Evidence as to an alleged, later or earlier, offense or act very like in nature may not therefore be considered by the Jury in determining whether the accused Rucker, in this case, did the act or acts charged in the indictment, nor may such evidence be considered for any other purposes whatever, unless the Jury first finds that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused Rucker did the act or acts charged in the indictment, leaving aside only the questions of identify and of whether the accused did the act or acts charged in the indictment knowingly, intentionally and

willfully and not because of innocent mistakes or other innocent reasons.

If the Jury should find beyond a reasonable doubt from the other evidence in the case, that the accused Rucker did the act or acts charged in the indictment, then the Jury may consider evidence as to an alleged earlier or later offense or act of a like nature in determining whether there was a plan, scheme or design, the question of identity and in determining the motive, the state of mind, knowledge or intent with which the accused did the act charged in the indictment and were all the elements of an alleged earlier or later offense or act of a like nature are established by evidence which is clear and conclusive, the Jury may, but is not obliged to draw the evidence and find that in doing the act charged or acts charged in the indictment the accused Rucker acted pursuant to a plan, scheme or design and/or that it was the accused that did the act or that the act that the accused did, did so willfully, knowingly, and with specific intent and not because of mistake or accident or other innocent reason.

Now, I give you that cautionary instruction.

I will give it to you when I give you full instructions on the law. But bear in mind that this evidence from this witness and, I believe, one or two exhibits which may be offered to follow it, is offered for that limited purpose only. It is what we call evidence of a similar claims, similar act.

All right.

MR. WELCH: Thank you, your Honor.

BY MR. WELCH:

Q Miss Cameron, what if anything unusual happened at the Marine Midland Bank?

A I was held up by gunpoint.

Q Do you recall what the person with the gun looked like?

A He was a black man, about 5' 7".

Q Was the black man alone or was anybody else with him?

A There was another man with him but he didn't approach my window.

Q Did the man speak to you?

A No, he handed me a withdrawal slip and on the back there was a note written, telling me that it was a holdup and to give me all the money in my cash.

Q Did the man have anything on his face?

A He wore a pair of glasses that had dark lenses. I think they were tortoiseshell and he had a hat on as well.

THE COURT: Where was this bank?

THE WITNESS: Hudson Avenue in the Two Guys Shopping Plaza.

THE COURT: What was the name of the bank?

THE WITNESS: Marine Midland.

Q Do you recall the address of the bank?

A 1500 Hudson.

THE CLERK: Government's Exhibit 20 marked for identification.

(So marked by the reporter)

MR. WELCH: May I tender this to the Court.

THE COURT: I have seen it.

MR. WELCH: Fine. I offer Government's Exhibit 20.

MR. LARIMER: Subject to any of my earlier comments in Court, I object.

MR. WOLFORD: And I assume along with this testimony, this exhibit also carries the admonition of the Court offered only to Defendant Rucker. Defendant Rucker's objection is overruled.

MR. WELCH: May I read it to the Jury?

THE COURT: Let's do the necessary first.

Mark it.

THE CLERK: Government's Exhibit 20 marked in evidence.

(So marked by the Reporter)

MR. WELCH: If counsel has no objection, I can dispense with the authentication, but I can read that also.

THE COURT: I don't think it is necessary. I take it this is a certified copy. There is no question about the authentication.

MR. LARIMER: It appears to be a certified copy.

MR. WELCH: "Monroe County Court, presiding Honorable Hyman T. Maas. Index Number 2049/76 Page Number 244, Indictment Number 189 filed February 20, 1976, The People versus Daniel Lee Rucker, the defendant having been indicted for the crime of Robbery in the First Degree, Sections 20.00 and 160.15, subdivision 2 and Grand Larceny Second Degree, 20.00 and 155.35 committed on the 15th day of January, 1976 in the County of Monroe, arraigned upon the indictment on that the 27th day of

Excerpts of Testimony of Nora Cameron.

February, 1976, Counsel C. Steinman. On the 27th day of February, 1976, pleads that he is not guilty of the two counts contained in Indictment No. 189. On the 3rd day of May, 1976, defendant changed plea to guilty to the crime of Grand Larceny, Third Degree, E Felony Section 155.30 and in full satisfaction of the two counts contained in Indictment No. 189. The Court appoints the 6 day of July, 1976 for the pronouncing judgment.

On said last mentioned day the defendant appeared for judgment and was asked by the clerk whether he had any legal cause to show why judgment should not be pronounced against him and no sufficient cause appearing why judgment should not be pronounced. On May 3, 1976 the District Attorney orally in open Court recommended that the defendant be permitted to plead guilty to the crime of Grand Larceny Third Degree, E Felony in the interest of justice.

(Sentence) Probation four years and ten months.

It is ordered and adjudged by the Court that the said Daniel Lee Rucker for the crime of Grand Larceny third degree, E Felony aforesaid, whereof he has been convicted, be imprisoned in the Monroe

County Jail for a term of sixty (60) days and Probation for four years and ten months.

He being sentenced to this 6 day of July, 1976.

The above named defendant was examined by the Court before judgment was pronounced and he sates that he was born at Forest City, Arkansas, resides at 241 Seneca Manor Drive, age 18 years.

Indictment State of New York, County of Monore. The People of the State of New York versus Charles Edward Rucker, Daniel Lee Rucker and Doyle Lee Rucker:

First Count:"--

THE COURT: Don't read the indictment. Read the attachments in connection with this unless you want ti read, counselor?

MR. WELCH: May we approach the bench?

THE COURT: No. Just read the statement in connection therewith.

MR. WELCH: The only indictment, the only place where Miss Cameron is mentioned --

THE COURT: You can point that out without reading the whole indictment.

MR. WELCH: Fine, your Honor.

Portions of Exhibit 20 read into Record.

Paragraph 2 of the First Count of the Indictment.

"The Defendants, on or about January 15, 1976, in the County of Monroe, State of New York, forcibly stole [redacted] to wit, a sum of United States currency, from Nora Cameron, and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime was armed with a deadly weapon, to wit, a .38 caliber, two inch barrel, pistol, serial number #29J591."

"Rochester Police Department, Public Safety Building, 150 S. Plymouth Avenue, Rochester, New York.

Dated January 15, 1976, Time 5:50 P.M.

My name is Daniel Rucker and I have been advised that I have the right to remain silent and that I do not have to answer any questions if I do not wish to. I have the right to consult with a lawyer before answering any questions and to have him here with me during the questioning, if I so desire. If I cannot afford a lawyer then one will be provided for me. If I so consent and agree to discuss this matter without a lawyer present, I

Portions of Exhibit 20 read into Record.

I can stop talking at any time.

I do understand the above Constitutional Rights and I agree to give up the above rights and I do consent to discuss this matter with you.

On January 15, 1976, at about 9:20 A.M., my brother Charles came over to my house at 175 Remington Street and asked me if he could take Ulysees' car so that he could pick up my cousin Doyle. Charles took the car and returned about one hour later with Doyle Rucker. Charles, Doyle and myself went into my bedroom and were listening to some records when my brother Charles said lets go see what we can get into. Doyle then asked me if I had a piece meaning a gun, and I told him yes, and that it was in the closet. Doyle then went and got the gun. It was a short black pistol and was loaded. And the gun belonged to my uncle John who is now down south. We then left the house and got into Ulysees' car which is a 1972 Cadillac, color Gold. I drove the car, Doyle was in the front passenger side, and my brother Charles was in the back seat. We drove around and then drove down Hudson Avenue and saw the Marine Midland Bank. My cousin Doyle said, lets check the

Portions of Exhibit 20 read into Record.

bank out. I then drove behind a tire store and parked next to the restaurant. Doyle and my brother got out of the car, and I stayed and waited for them. I was waiting for them to come back because they were only going to check it out to see if it was possible to rob the bank. A few minutes later Doyle and my brother Charles came running back and got into the car. My cousin Doyle kept telling me to drive, meaning to leave there. They never told me that they robbed the bank, but I figured that they did because they came running from the bank and told me to drive. I then drove back to my house at 175 Remington Street and all three of us went into the house. I took my sweater off and locked the door and then went into my bedroom and saw Doyle and Charles counting the money on my bed. My brother Charles and Doyle were putting the money into one hundred dollar piles on the bed. I took a couple piles and folded it with the money that was mine, then put a rubber band around it and put the money in my pants pocket. I took about \$200.00 dollars of the bank money and the rest was mine. I then went out to empty the garbage on

Section 404 read into Record by Court.

Ketchum Street and saw a Police man looking at Ulysees' car. I asked him what was the matter, and he asked if I knew whose car this was. More police came and I was placed under arrest and taken to the Detective Bureau. At the Et. Bu. Det. Casper searched me and found the money.

Witness: I have read this statement and had it read to me, it is true and accurate, and no promises have been made to me by the police. I have been treated good by the police. Daniel Rucker."

THE COURT: Now, remember, Ladies and Gentlemen, I said with respect to this witness' testimony and that exhibit. You are not here to determine what was contained in that exhibit or this witness' testimony.

This is being offered solely as proof of similar acts or allegedly similar acts by the Defendant Rucker. It is being offered solely against the defendant Rucker.

Let me read to you the statute, Section 404 which makes this evidence admissible, in a case such as this.

"Evidence of other crimes, rules or acts, is

not admissible to prove the character of a person, in order to show that he acted in conformity therewith.

It may, however, be admissible for other purposes such as proof of motive, opportunities, intents, preparation, plan, knowledge, identify or absence of or mistake or accident."

Keep your eye on the ball. We are here to determine guilt or innocence on the four counts of the indictment. Bear in mind the instructions I gave you.

All right. Do you wish to cross examine again?

MR. LARIMER: No. I have no questions of this witness.

MR. WOLFORD: I have no questions.

THE COURT: You may step down.

MR. WELCH: At this time the United States rests.

THE COURT: Ladies and Gentlemen, we will take a very brief recess. Don't discuss the case.

Mr. Welch.

(At this point the jury leaves the courtroom.)

MR. LARIMER: Your Honor, at this time, on behalf of the defendant, Danny Rucker, I would move for an adjournment of acquittal as to Count 1 of the indictment that charges that on or about May the 14th Dan Rucker did enter the Marine Midland Bank with intent to commit a felony on the bank.

Your Honor, I think it is clear in this count that someone entered the bank with specific intent to commit a felony. In this case the indictment specifies that that crime was the taking by force and violence and by intimidation of employees of Marine Midland Bank. I think the testimony here is unequivocal that the principal, Roberto Rivera, on May the 14th, that is the second of the two days in question, had no intent whatsoever to enter that bank to do anything.

THE COURT: I thought that would be the thrust of your motion. My question to you, is he the principal in this indictment or nothing but the agent, isn't the question of who had the intent the question of whether your client had the intent and it didn't really make much difference what the agent's intent was?

MR. LARIMER: He is being charged as someone who is aiding and abetting the actual robber; who went

Motion to Dismiss Count 1 of Indictment against Rucker.

in allegedly with the intent to commit the crime. My point is, how could he be convicted of aiding and abetting someone who has no intent whatsoever to go into the bank by his own testimony?

THE COURT: The statute is not quite that simple. The statute says -- I thought that was going to be your argument, but the statute says whoever enters or attempts to enter any bank and so forth with intent to commit in such bank or in such savings and loan association any felony affecting such bank and so forth.

If Daniel Rucker through an agent entered the bank and it was Daniel Lee Rucker who had the intent to commit the felony, wouldn't that be sufficient? That is my question.

MR. LARIMER: I don't think that is the traditional agency theory here, your Honor. The only case I have been able to find on the matter is not directly on all four, but it was a case in the Eighth Circuit Jarboe 513 Fed. Section 33. And the Court talked about the aiding and abetting and the specific intent. And it said, assuming the aider and abettor shared the specific intent of the principal robber who went into the bank, then he could be found guilty. And they have held that conviction.

But in that case I don't think there was any question that the robber intended to do what he did because he went in and he pointed a gun at various tellers and I believe, got some money. So, I just don't think there has been any testimony at all or evidence from the tellers that this man who entered the bank did anything but go in and look around and get identified and leave. And he himself contrary to what most bank robbers who would be on trial would say, he said he had no intention whatsoever of doing anything inside the bank. And he was afraid of Mr. Rucker and just went ahead and just to please him apparently. And I think there has been a basic failure of proof here. And the jury should not be allowed to speculate on such a crucial element of this offense.

THE COURT: Well, I understand your argument. I have thought about it a long while. I don't know what the Government's theory is, but as I saw the case develop I think it must be the Government's theory without asking what the Government's theory is, that the requisite intent resides in the principal. It is sufficient as long as somebody enters the bank. The person who enters does not necessarily have to have the requisite intent. It's like the conspiracy theory that a person who may conspire or commit an

Argument on Motion.

overt act or doing a wrongful act and yet never accomplish what he originally intended to do and yet be guilty of the crime.

MR. WELCH: They have also got him, of course, charged with the conspiracy. And I think that statute reads this very carefully. Whoever enters with intent, and that is the person who enters, must have the intent --

THE COURT: But he says Rucker entered through the agent with requisite intent. That is the Government's charge. It's for the jury to determine whether Rucker did enter with the requisite intent through his agent. Maybe the agent had no such intent, but that is something unless Rucker knew that the agent didn't have any intent, I don't think Rucker could get himself out from underneath because the agent now disclaims any such intent.

Is that your theory, Mr. Welch?

MR. WELCH: Your Honor, Mr. Rucker's intent is critical, but I also think that the Court examining Mr. Rivera's testimony, it was only after extensive cross-examination that Mr. Larimer finally convinced him to say that no, I guess I really didn't want to rob that bank. But the way he asked it proves he did want to enter the bank. He entered the bank with a

gun in his hand and stood around to see if anybody noticed him and immediately he was recognized and ran out.

THE COURT: It is your theory that their disclaimer is something the jury may or may not --

MR. WELCH: Credits, yes, your Honor.

THE COURT: You say with respect to my theory, if that is not your theory --

MR. WELCH: My understanding of the law of the aiding and abetting is Mr. Rucker's intent is what is critical. There are two bases to deny the motion. It is a real jury question whether Rivera had the requisite intent to do that. But number two, even if he didn't, even under the law as I understand it and I have not found any cases contrary and I have not read this case that Mr. Larimer decided, but I have not found any cases that say that if the agent does not have the intent then he has not violated the statute. What counts is the principal's intent.

THE COURT: That is what I would have said. I will have to deny them, I'm afraid, on that ground, though I see your point. I mean, I thought about the point. It is not something that I had not thought about.

MR. LARIMER: Well, I don't know. You will

Argument on Motion.

apparently not get to the charge this evening, then. I will prepare an instruction for the Court since I think the element of intent is crucial. And it is my feeling still that the intent must be that of the person who enters the bank.

THE COURT: I understand.

MR. LARIMER: And I ask the Court to so instruct the jury.

THE COURT: I have got a real problem to wrestle with on that one. I could submit it on both theories or if the Government wants to go solely on the question of whether Robert Rivera had the requisite intent and should so find, I will restrict it to that. I think the statute contemplates the entry here by -- I mean the charge is that Rucker entered through an agent.

MR. L. RIMER: Citing Section 2 which is the aiding and abetting section, I don't think that is an agency kind of --

THE COURT: Well, it's in a sense. The Government's theory, as I understand it, is he --

MR. WELCH: He caused him to do it.

THE COURT: He caused him to do it. And that is the aiding and abetting theory. But in causing it he had the requisite intent. Whether the agent had

the requisite intent or not they say is immaterial. They may or may not say that. At least, that is what I thought they would say.

MR. LARIMER: If Rucker was not involved at all and Rivera did what he did and testified as he testified, it would be pretty clear the charge would have to be dismissed because there was no intent.

THE COURT: Well, no, I don't even buy that. What the Government says on that score is that he is now claiming they didn't have the requisite intent, but he went in there fully prepared to pass the note. And now he is claiming his innocence. That is after he is caught.

MR. WELCH: That is our position, your Honor. He entered that bank doing everything consistent with the intent to rob that bank.

MR. LARIMER: Except he's a Government witness, not a defendant.

THE COURT: I understand, but I wouldn't say exactly that he was, you know, one doesn't vouch for witnesses any more under the new Rules. Okay. What else do you have?

MR. LARIMER: I am afraid that is all.

THE COURT: I assume that you also move to dismiss on the ground of general insufficiency --

Motion to Dismiss Counts 2 and 4 of Indictment against Smith.

MR. LARIMER: Yes, as to the other counts there is insufficient evidence for the jury to find guilt beyond a reasonable doubt.

THE COURT: Well, I will have to deny that.

MR. WOLFORD: May it please the Court, your Honor, at this time I would like to move for an adjournment of acquittal on behalf of Eugene Smith with reference to Count 2 and 4 of the indictment on grounds that the evidence presented is insufficient to allow a jury to consider it.

Well, I would like to say very briefly that as I understand it, there is really one item of evidence that purportedly connects Mr. Smith with the First National Bank robbery and that is a note that he purportedly prepared, as I recall the testimony of Mr. Brown. There was nothing else that Mr. Smith did.

THE COURT: Didn't he ride the bike up to Gold Circle --

MR. WOLFORD: I think the testimony indicated that they all went to the Gold Circle Store first and then Mr. Brown went off and into the sunset with the 10-speed bike.

THE COURT: Then wasn't he into receipt of some money?

Motion to Dismiss Counts 2 and 4 of Indictment against Smith.

MR. WOLFORD: , That is Mr. Brown's testimony.

However, he forgot about his totally inconsistent statement made four hours after the bank robbery.

THE COURT: Didn't Mr. Hall say he saw them counting money?

MR. WOLFORD: That would be my other point. I think that Mr. Hall totally refutes the Government's theory in this case. He connects not Eugene Smith, but Michael Smith with running from the bank with Mr. Rucker. He also admits that the statements he previously made to the police was accurate and there was no mention of Smith, Eugene Smith, to the police at that time.

THE COURT: Isn't it all a question of fact for the jury?

MR. WOLFORD: I think your Honor that the mistake to overlook is the very crucial testimony of Mr. Hall that has been presented here. And that as far as I am concerned, he totally exonerates Mr. Smith other than a year and a half later coming in and saying, yes, Eugene Smith was in the room where the money was counted; he was there, does that connect Mr. Hall with the robbery, your Honor?

I think the evidence viewed most favorable to the Government indicates that it's insufficient with

reference to Mr. Smith. That would be the basis of my motion.

THE COURT: I have to deny it.

Are you read to go forward, gentlemen?

MR. LARIMER: Your Honor, I am ready, but with one problem. Mr. Rucker, unfortunately, during the lunch hour attempted to get a witness. That witness apparently got actually into the Federal Building and changed his mind. I would request that I give a subpoena to the Marshal, since he apparently is working over at the so-called old Federal building which is just one block away.

THE COURT: I am not going to hold up this trial for subpoenas at this time, at this point. You understand if both sides rest we are going right into summations.

MR. LARIMER: I have other witnesses. I would like to try to have the Marshals now see if they can convince --

THE COURT: I will be glad to sign anything you want if you want to serve a subpoena. I am not going to hold a trial up on a speculative witness that comes in and goes out.

MR. LARIMER: Could I have at least a minute to give this to the Marshal?

* * * * *

Excerpts of Testimony of Eugene Carlton Smith.

Q Did you ever tell him that accidents could happen to his family if he testified?

A No I did not.

MR. WELCH: I have nothing further your Honor.

MR. LARIMER: I have nother further.

THE COURT: Step down.

MR. LARIMER: Your Honor I have no other witnesses and defendant Rucker rests.

MR. WOLFORD: Eugene Carlton Smith is called to the stand.

EUGENE CARLTON SMITH, was called as a witness after having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WOLFORD:

Q Would you please speak into the microphone.
Mr. Smith where do you reside?

A 99 Wellmington Avenue.

Q With whom do you reside there with?

A My mother and my sisters and brothers.

Q How many sisters and brothers do you have?

A I have two sisters and four brothers.

Q Michael Smith is one of your brothers?

A Yes.

Q How old are you Gene?

A Twenty one.

Q Would you tell us whether you have graduated from high school or not.

A No. I went to eleventh grade and I got kicked out of school.

Q You went to the eleventh grade where?

A Monroe High School.

Q Have you ever been convicted of any crimes?

A Yes.

Q Would you tell us what and when?

A A burglary in January 13, 1976.

Q Did you plead guilty to burglary - -

A Yes.

Q This was where? In other words, where did you plead guilty, in what Court?

A County Court.

Q Monroe County Court?

A Yes.

Q Now, were you sentenced for that particular crime?

A Yes.

Q Could you tell us what you were sentenced to?

A I was sentenced to a rehabilitation center. It

* * * * *

A No.

Q Directing your attention to Exhibit 5, Government's Exhibit 5 that has been marked for identification, did you write that note?

A No.

Q Now Mr. Smith, that day, September 29th, did you at any time go to the Gold Circle Store?

A No.

Q Were you aware at any time while you were either talking to Mr. Brown, immediately after he left, that he was going to go and rob a bank, the First National Bank?

A No.

Q Mr. Brown, as you know or as he testified in this trial and he has made some reference to a purse snatching that he said occurred in March of '76, were you with him in March of 1976 at Super-Saver Market (phonetic) in Rochester?

A No.

Q Where were you in March of 1976?

A In Buffalo in the Rehabilitation Center.

MR. LARIMER: I have no further questions.

CROSS-EXAMINATION .

BY MR. WELCH:

Excerpts of Testimony of Eugene Carlton Smith.

Q Mr. Smith, when did you say was the first time you saw Mr. Brown on September 29th?

A That morning in his room, bedroom.

Q How did you get into the house?

A I knocked on the door and his mother came to the door.

Q So, his mother saw you go to Mr. Brown's room?

A Yes.

Q You smoked how much marijuana did you say?

A Seven joints.

Q And you said that was one ounce?

A No, I had an ounce and we smoked seven joints out of the ounce, cigarettes as you would call it.

Q How much did you have left?

A I don't really know. I had an ounce. An ounce is about like this and about like this. And it gets filled up.

Q After joints it's hard to tell how much you had left, is that correct?

A No, you can look at it and see you had a lot left.

Q Can you think clearly after you have had seven joints?

A I could, yes.

Q You could?

A Yes.

Q How many joints did Mr. Brown have?

A We had smoked seven together, you know,
the both of us.

Q Was anyone else there with you smoking those
joints?

A No.

Q Was anyone else in the house?

A Let me see, yes.

Q Was Danny Rucker there?

A No.

Q Who else was in the house?

A I have a brother, Richard Smith. He was in
the house.

Q Anyone else?

A No.

Q Now in this rehabilitation center in
Buffalo, did you stay there from the first day you arrived
in January until you were finally released in the summer?

A No.

Q You had weekend releases, is that correct?

A Yes.

Q Do you know how many weekend releases you had?

A Yes, I had two.

Q You had two weekend releases?

A I would say three. I had three.

Q Well is it two or three?

A Three.

Q So you were not in Buffalo from January until you had occasion to come home from Buffalo?

A Yes.

Q And at that time you were living in Seneca Manor Drive?

A Yes.

Q Was there a follow-up program that you had to go through when you got out?

A Yes.

Q What did that include?

A An after-care office. And I had to see him every Tuesday, you know, every week.

Q Every Tuesday?

A Yes.

Q You are sure it was a Tuesday?

A Yes, every Tuesday I had to be there.

Q You didn't have to see him on Wednesdays?

A No.

Q Did that ever get varied from time to time when you showed up on one Tuesday, they would give you another day for the next week?

A No.

Q Did you have to go there on Tuesdays in September of 1976?

A Yes.

Q Did you ever miss any of those appointments?

A Yes, I have missed.

Q Did you miss any in September?

A No.

Q Are you sure of that?

A Yes. Wait, I did miss one and I had went on a Wednesday. I had missed one. I was supposed to go on a Tuesday and I missed it. And I called up so he said come in that week. So I went there on Wednesday that next day, the following day because I had not gone that Tuesday. So Wednesday I had went.

Q Did you have other appointments on Wednesdays?

A No.

Q Did you have an appointment on September the 29th?

A To go see him?

Q Yes.

A No, I went there though to see him.

Q You did go there?

A Yes.

Q On September 29th?

A Yes.

Q What time?

A Five after one I was there.

Q Did he ask you how much marijuana you had smoked that day?

A No.

Q By that time you had smoked seven refceers and then you went to see your counsellor?

A Yes, I took a bath and dressed and left, yes.

MR. WELCH: I have no further questions, your Honor.

MR. LARIMER: I have no questions.

MR. WOLFORD: I have no further questions.

THE COURT: You may step down.

MR. WOLFORD: Defendant Smith rests, your Honor.

MR. WELCH: Could we approach the Bench, your Honor?

THE COURT: Yes.

* * * * *

we can finish tomorrow, so I am going to ask you to inconvenience yourself a little bit and ask you to get in here by 9 o'clock. And we will try and start at 9 o'clock and try to finish the case as soon as we can. I will give you an hour offset in exchange for an hour in the morning. Don't discuss the case. I will see you tomorrow.

(At this point the jury leaves the courtroom.)

THE COURT: I would like to utilize some portion of this time in the discussion of the question of how to present the entry question to the jury. Has Mr. Houlihan done any work on this question?

MR. WELCH: I did not hear, which question?

THE COURT: The question that we discussed in the motion to dismiss, the entry, aiding and abetting --

MR. WELCH: I don't think he has, no.

THE COURT: Well, the indictment charges that Mr. Rucker **entered** with the intent. The only theory that could happen is that Daniel Lee Rucker caused another to enter the Marine Midland and he did such causation or did the act forming the cause and he did it with the intent rather than the agent as I read it.

Discussion.

MR. WELCH: I think there is evidence here that they both had the intent.

THE COURT: Okay, let's assume that for a moment. Which way do you want me to charge the jury, that is what I am getting down to, and if so, in what language?

MR. LARIMER: My position is the one who enters the bank has to have the intent. That is the gravamen of the offense. I stated that before.

THE COURT: I understand your position. I am not so sure if it is correct in the light of what I indicated to you. The charge here is not that Rivera entered the bank with intent, the charge is that Rucker entered or caused to be entered the bank with the intent.

MR. LARIMER: By aiding and abetting Rivera.

THE COURT: Well, you have to read the aiding and abetting statute which is broader than aiding and abetting. The statute says, unless my memory fails me, whoever willfully causes an act to be done, which if directly performed by him or another, would be an offense against the United States and punishable as a principle. That is the second paragraph from the aiding and abetting. Indeed, the first paragraph is whoever

counsels, commands, induce or procures its commission is punishable as a principal. So, that if the Government's theory is that Rucker caused, commanded, induced and procured the entry into this bank and Rucker did so with the intent to commit a felony affecting that bank, I think it is a good theory.

I don't know whether it makes a particle of difference whether the agent, let's assume that the agent was a robot for the sake of argument and incapable of forming an intent other than that Mr. Rucker had and he sent the robot into the bank and the robot passed the note and said I am going to blow myself up and all of you along with me unless you give me the money; and the girl believed him and handed him the money and the robot turned around and walked out and gave the money to Mr. Rucker, it wouldn't make a particle of difference whether the robot had any intents. I would say that he had violated that statute. That is the Government's theory or one of the Government's theories.

MR. WELCH: I really think that we have to go on both theories. If the 2nd Circuit disagrees with my analysis or your Honor's analysis, if we

Discussion.

get that far on either theory --

THE COURT: Your client wants you.

MR. LARIMER: Well, before I lose my train of thought, as I read Section 2-B it says whoever causes an act to be done which if directly performed by that person would be an offense against the United States, it will not be an offense unless the person entering the bank had a requisite intent.

THE COURT: Let's go back to my robot theory. Let's take it out of Mr. Rucker's hand and put it in yours and my hands. Let's say that I look into your eyes and I say Larimer go across the street to the First National Bank and get me the money. And you say yes, Judge. And I hand you the note and away you go and I have got you under hypnosis. And you go down the elevator and across the street and go to that place and you go into the bank and you hand them the note and you get the money and you come back here and I snap my fingers and you come out of the hypnosis have I not entered the bank with the intent to commit a felony? That is a simple question, isn't it?

MR. LARIMER: I would say in that case that I went over to the bank.

THE COURT: You had no intent.

MR. LARIMER: And willfully committed an act.

THE COURT: No, you could legitimately get on that witness stand and say members of the jury and judge I had no intent whatsoever. He monopolized my will and I absolutely had no intent. He hypnotized me. Wouldn't I be guilty of robbing the bank? That is my question.

MR. LARIMER: I could see the Court's point.

THE COURT: Thank you. That is the theory that I thought the Government was operating under. They are apparently operating on two theories.

MR. WELCH: I see the problem that the Court has in attempting to get a decision from the jury as to why they decided one way or the other. I think we can submit it to the jury on whether --

THE COURT: I don't think they have to decide one way or the other. I am just wondering whether you want to go on both theories. The thing that troubles me about proof beyond a reasonable doubt -- Well, I don't know. I suppose it is a jury question as to whether or not Mr. Rivera had changed his mind as to what purpose he went into that bank. If you want to submit it to them on that basis, I suppose you could on that basis.

I would still like to know before 9 o'clock tomorrow morning, I would still like to know --

MR. WELCH: I would be satisfied if your Honor submitted to them with simply that they have to decide whether or not Mr. Rucker had the intent. That would certainly simplify the instruction. I would be willing to argue that instruction.

THE COURT: I am not trying to run your prosecution.

MR. WELCH: I am saying if I should have to argue it at Appellate Court I would be willing to argue that decision at a later time. I think both theories are sound, your Honor. And it's just going to complicate the decision of the jury if they have two theories presented to them. I would operate on the first theory of whether or not Rucker had the requisite intent.

THE COURT: Your connection in that is mainly cause, whether there was a direct cause, but that I think you got in.

MR. WELCH: I think he is charged as aiding and abetting --

THE COURT: When you get into aiding and abetting, if it's just aiding and abetting he might not have -- well, with the requisite intent, as long

someone performed all of the acts I guess and entered with the intent, that is Mr. Larimer's point you see. He entered, but he did not enter with the intent.

MR. LARIMER: Which I think was a crucial element of the case. No matter what Mr. Rucker's intent was, if that man never went in that bank there would be no crime except maybe conspiracy which I think is really all this is.

THE COURT: His argument, of course, is you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the case is committed by some person or persons and that the Defendant participated in its commission. The Government would say, well as long as Rucker had the intent and caused the entry that is enough because some person or persons had committed the element of the crime which constituted the intent.

MR. LARIMER: I think the Government has to elect whether they are proceeding against Mr. Rucker as a principal or as an aider and abettor.

THE COURT: You could be a partner and still responsible.

MR. LARIMER: If he is the principal, then I guess their theory is one of causation, that he caused someone else, a robot like, to go into the bank. I don't think they can have it both ways.

THE COURT: The jury could make the determination, can't they? As long as they determine one or the other is what the Government said.

MR. LARIMER: I am not sure if that is a material variant from what the indictment alleges.

THE COURT: The indictment does say that Rucker entered. That is why I thought that was the Government's theory right from the start. The Government did not say that Daniel Rucker and Roberto Rivera entered with the intent. It says Rucker entered --

MR. LARIMER: Then I think they are stuck with their robot theory. I don't think they can claim he is either a principal or an aider or abettor.

THE COURT: He is a principal according to them. According to the indictment is what you

MR. LARIMER: That is right.

THE COURT: He says he is willing to go on that theory.

MR. WOLFORD: For my client I think it is appropriate. In other words, he is obviously charged with aiding and abetting in Count Two of the indictment.

Maybe I misinterpreted your statement to me.

THE COURT: The indictment charges, of course, Count One and Two and Mr. Larimer suggested they should not be held to it. Well, is the Government making that election?

MR. WELCH: Your charge under A and B, Section 2 is all that is in the indictment. He did cause and aid and abet both on the Marine Midland Bank robbery. I don't feel we have to elect. Our position is he did all of those things.

THE COURT: The statute, the aiding and abetting statute treats the aider and abettor just as if he was a principal. So, that if the theory being that if you are down in Florida and I called you up and I got you under hypnosis and tell you to go across the street and rob the First National Bank under hypnosis, even though I am not in Florida I am the guilty party. That is the theory.

MR. WELCH: I think under that set of facts, your Honor, that would fall under Subsection B, but if I also met with my hypnotized robot person and gave that person a gun and a demand note, then I would have also aided and abetted.

THE COURT: Even if I didn't hypnotize him or even if you just went in there and I had the intent --

MR. WELCH: What you are saying is that I would be guilty if I said to Mr. Larimer here is a gun, here is a pair of shades and go across the street. And he has no real intent to do it, but I have the intent to do it. And he enters the bank and he hands up the note you say that that is -- Well, if it was a joke, if you said go rob the bank, ha ha, here is the stuff --

THE COURT: I am not joking. I am dead serious. He is just doing it, but has no intention of doing it. So, he just goes across the street and you send the FBI after me and you say I am guilty --

MR. WELCH: Yes, your Honor.

THE COURT: I can't help but agree with the Government. I think if I did it and I was dead

serious, even though you were just doing it to obey the order of the Court and had no intention of fulfilling the order, I would be guilty --

MR. LARIMER: Well I don't know whether the case of hypnosis or robot are really proper to feeling people and those are defenses in themselves of duress or something else.

THE COURT: Let's assume I order you to go and you are an officer of the Court and I hand you a gun and I hand you a pair of shades, as they call it, and I say Larimer go across the street and you say yes your Honor. And you say, hey Welford I am not going to do anything and you go in and you hand up the note and you walk out again and come back and say Judge it was impossible, but am I not guilty? You may not be guilty, but am I not guilty?

MR. LARIMER: Well, it would be that you would not be perhaps of conspiracy.

THE COURT: But I have the requisite intent. I wanted you to rob that bank.

MR. LARIMER: But you caused me to do nothing because what you caused me to do --

THE COURT: I don't think success or failure is the key. Once you enter with the intent --

MR. LARIMER: That was the intent of Congress to prevent people from entering banks to do harm to employees. And what you intended for me to do was never carried out. You might have a conspiracy, but it is not carried out.

THE COURT: Well, when someone is apprehended by the bank guard before they can complete the robbery, take what they are after, this is almost what we have in this situation. If I caused you to go that far I am afraid that I am guilty. Well, I will sleep on it. Have a good time at your office.

MR. WOLFORD: My client has asked me to talk to you again about this situation. He wants to talk to you personally about it. He tells me he was up to five o'clock last night with his girlfriend's baby and that he had attempted to get here in time and unfortunately didn't. It will cause him a great deal of problems if he is going to be held overnight in the jail.

THE COURT: Well, maybe if this had been his first time being late I might have been more sympathetic, but this trial is costing the Government a lot of money. We have six jurors. We have a judge who has come up from New York with

* * * * *

A206

Excerpts of Proceedings, dated 10-27-78.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

DANIEL LEE RUCKER and
EUGENE SMITH,

Defendants.

United States Courthouse
October 27, 1978

B e f o r e:

HONORABLE THOMAS C. PLATT, U.S.D.J.

Excerpts of Testimony of David Brown.

* * * * *

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there. Now, I think it's improper rebuttal testimony to come back to try to refute something that was brought out on cross-examination for the first time.

THE COURT: No, it was given by way of an alibi. He can refute an alibi as I see it.

MR. WOLFORD: The alibi was given on cross-examination.

THE COURT: It does not make a difference when he gave it.

(End of side bar discussion.)

D A V I D B R O W N was called as a witness after having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Brown would you lean forward and talk into the microphone please so the ladies and gentlemen of the jury can hear you. Do you know Bigs, Brown?

A Yes.

Q Who is Bigs Brown?

A My brother.

Q You have to speak a little louder please. Do you know Michael Smith?

A Yeah I know him.

Q Did you see Michael Smith in the late afternoon or evening of September 29th the day that your brother Bigs robbed the bank.

A Yeah I saw him.

Q Did you gamble with him at that time?

A No.

Q Did you have any money at that time?

A No.

Q Did Michael Smith have any money?

A Yeah he had some money.

Q How much money?

A About seventy dollars that I had seen.

MR. WELCH: I have no further questions.

CROSS-EXAMINATION

BY MR. LARIMER:

Q Do you know that your brother testified in here a couple of days ago?

A Yeah I knew it.

Q And you talked to him about that didn't you?

A No not really.

Q What do you mean not really? You did talk to him about his testifying didn't you?

A I didn't talk to him. He doesn't stay with me

no more.

Q How did you know he was testifying here?

A He had came to get me you know.

Q Where did he come and get you?

A At home.

Q What did he come and get you for?

A To come down here.

Q Today?

A Yeah.

Q What did he tell you the reason for your coming here today was?

A So I could testify.

Q Testify about what?

A About the bank robbery.

Q Well did he tell you what questions you would be asked?

A No.

Q Did he tell you that he was cross-examined here on the stand by several lawyers?

A No.

Q Was this the first time that anyone talked to you about testifying here?

A No.

Q It's not the first time? When was the other

time someone talked to you?

A Last night.

Q Last night?

A Yes.

Q Is that someone from the F.B.I.?

A Yes.

Q Did they tell you what testimony was given here yesterday?

A Yes.

Q How long did you talk to someone from the F.B.I.?

A About twenty five, twenty minutes.

Q Did they tell you there was testimony that you had a substantial amount of money on the day of the robbery September 29, 1976?

A Yes.

Q And you deny that now?

A Right.,

Q Is it your testimony that you were gambling with Mr. Smith on that day?

A Is it the testimony that I was?

Q Yes.

A I was not.

Q What were you doing then?

A Nothing.

Q Just watching - -

A I said nobody was gambling.

Q There was no gambling at all on that day?

A No.

Q Do you recall what you were doing on the morning of September the 29th?

A I was sleeping until about two o'clock.

Q You slept all day until about two o'clock in the afternoon?

A Yes.

Q Where was this?

A At home.

Q Do you normally sleep that late?

A Yeah.

Q Every day you sleep until two o'clock in the afternoon?

A Yes except I go to school now.

Q Pardon me.

A I go to school now.

Q Back at the time you were going to school you slept until two o'clock every day?

A Yeah.

Q Do you know when this bank robbery was?

A I didn't know until about six o'clock. I heard

it on the news.

Q Do you know that it was sometime before two o'clock?

A Before two o'clock the bank robbery?

Q Yes.

A No, I didn't know what time it took place.

Q Do you now know what time it took place?

A Yes.

Q It was before two o'clock wasn't it?

A Yes.

Q I didn't hear you.

A Somewhere around there.

Q You just happened to be in bed?

A Yes.

MR. LARIMER: I have nothing further.

MR. WOLFORD: I have nothing.

THE COURT: You may step down.

MR. WELCH: The United States calls Freddy Webb.

F R E D D Y W E B B was called as a witness after

having been first duly sworn by the Clerk of the

Court, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Webb, would you lean forward and speak into the microphone please so the ladies and gentlemen of the jury could hear you. Do you know the defendant Danny Rucker?

A Yes I do.

Q Do you see him in the Courtroom today?

A Yes.

Q Would you tell the ladies and gentlemen of the jury what he has on, just on the top, what kind of clothes?

A A sweater, a blue and white striped shirt.

MR. WELCH: May the record reflect he has identified the defendant Danny Rucker.

THE COURT: Yes.

Q Did you see Danny Rucker yesterday?

A Yes, I did.

MR. LARIMER: Objection. May we approach the bench?

THE COURT: Yes.

(A side bar discussion.)

MR. LARIMER: Your Honor, I would like a proffer from the Government as to the purpose of his testimony. There was no mention of any defense testimony about a Fred Webb. Therefore, I think this is highly impermissible rebuttal.

THE COURT: It depends on what he says.

MR. LARIMER: There was no mention of Mr. Webb at all.

MR. WELCH: I am inclined to make a proffer to your Honor.

THE COURT: Out of their presence or in their presence?

MR. WELCH: In their presence. I think that is the best way to do it. Mr. Webb informed Agent Carney yesterday evening that yesterday afternoon at about one twenty to one fifty, somewhere around lunch time, Mr. Rucker came to the old Federal building where Mr. Webb was then employed. Mr. Rucker gave Mr. Webb what appeared to be a subpoena and said you have to come to the Federal Court and testify. Mr. Webb's employer said if you have been subpoenaed you have to testify. So, he followed Rucker over here. On the way over Rucker said you have to do me a favor, you have to go in and say that Gene and I have nothing to do with that robbery and that it was Bigs and Big's brother David. This witness then said I refuse to. I am not going to lie. And Danny Rucker said I will give you four hundred dollars if you will say that. This witness said, he told him that was silly because I am going to make nine thousand dollars and

I am not going to risk going to jail for the four hundred dollars. He then went back.

MR. LARIMER: The government has not mentioned anything about this witness yesterday.

THE COURT: Let's go.

MR. WOLFORD: As to the defendant Smith this is highly prejudicial.

THE COURT: Maybe. Let's go.

(End of side bar discussion.)

Q Where did you see Danny Rucker?

A On my job.

Q Where is your job?

A At the old Federal building.

Q Where is that in relation to here?

A Across the street.

Q Do you recall what time of the day it was?

A One fifty.

Q Did you have a conversation with Danny Rucker?

A Yes.

Q What did he say to you?

MR. WOLFORD: I object to any statements being introduced at this time unless the jury is admonished that it's only been received as to the defendant Rucker and not the defendant Smith.

THE COURT: Against whom are you offering this testimony?

MR. WELCH: I am offering it against the defendant Rucker.

THE COURT: All right. It is solely against the defendant Rucker and not against the defendant Smith.

Q Would you tell the ladies and gentlemen of the jury what Danny Rucker told you?

A He handed me a subpoena and told me I had to come to Court.

THE COURT: Lean forward and speak into the microphone. I don't think the jury can hear you.

A He handed me a subpoena and told me I had to come to Court and testify.

Q Did he tell you what he wanted you to testify about?

A He said to come to Court and testify that Edward Brown told me that him and Eugene did not have nothing to do with it.

Q What did you say to him?

A I told him I was not going to lie for nobody.

Q Do you have any knowledge of your own of the robbery?

A Well I know they had Edward.

Q Was there any other conversation with Danny Rucker yesterday?

A Yes.

Q What else was said?

A He said I was going to get paid.

Q Paid what?

A Four hundred dollars.

Q By whom?

A By him.

Q What did you say to that?

A I said no. I was not going to get myself into no trouble.

MR. WELCH: I have no further questions your

Honor.

CROSS-EXAMINATION

BY MR. LARIMER:

Q Mr. Webb, when you were contacted yesterday, where was it that you were contracted?

A On my job.

Q You were at work at that time weren't you?

A Yes.

Q When did you get out of work? What was your normal quitting time?

A Four thirty.

Q This was sometime around one o'clock that Mr. Rucker allegedly saw you?

A I left work at two o'clock.

Q But you were supposed to leave at four thirty, correct?

A Yes.

Q Has there been trouble in the past about your leaving the job when you were not supposed to?

A No.

Q Did you have to go to speak to your boss to leave the job yesterday?

A Yes. I do.

Q You didn't want to leave your job did you?

A No.

Q You make good money there don't you?

A Yes.

Q Now the money that Mr. Rucker was supposed to have given to you, did you see it, did he offer you any money at that time?

A Well he didn't show me any money.

Q This subpoena, did you actually receive the subpoena?

A Yes I had it in my hand. I walked all the way

over here to the building with it.

Q In spite of that you still didn't want to come in here, is that your testimony?

A Yes.

Q Isn't it a fact that you presently live with Edward Brown?

A No he lives with me.

Q And you have talked with Mr. Brown before today about this trial haven't you?

A No. Not since he has been coming to Court.

Q Didn't you know that he testified here in Court?

A Yeah I know he came to Court.

Q Didn't you know he was here for the better part of at least one day?

A I know he was here more than one day. I don't know.

Q Isn't it a fact that after he came here he would talk to you and tell you what happened in Court?

A No.

Q He never mentioned anything about what happened?

A I told him don't tell me nothing. I said I don't want to know nothing.

Q Why is that? Did you anticipate being called

as a witness?

A Like I just, like I didn't have nothing to do with it.

Q You weren't at all interested in what Mr. Brown was doing here in Court testifying about?

A No. N

Q Isn't it a fact that Mr. Brown told you he had been questioned about his involvement in the robbery as well as his brother's involvement in the robbery?

A Would you repeat that question.

Q Isn't it a fact that Mr. Brown told you that he was questioned about his involvement in the robbery as well as his brother's possible involvement in the robbery?

A I don't recall him telling me that.

Q But do you recall him telling you about this trial or his testimony or his involvement in it?

A The only thing he said is he didn't have to go back to Court no more.

Q Then the F.B.I. contacted you last night, do you recall when that was?

A I don't know what time it was, no.

Q When you left here yesterday you testified a few minutes ago that you had received or seen the subpoena, isn't that correct?

A Yes.

Q When the F.B.I. came, isn't it a fact that you thought you were in trouble for not coming to Court pursuant to that subpoena?

A Yes.

Q So you were telling the F.B.I. something so they wouldn't put you in jail for not complying with the subpoena, isn't that true? You didn't want to get into trouble for not complying with that subpoena, did you?

A No.

Q What was it the F.B.I. said to you when they first talked to you? Did they ask you why you didn't come to Court?

A I don't remember. I was all upset yesterday you know.

Q You were upset because you didn't comply with the subpoena isn't that a fact?

A No, I was not upset - -

Q You didn't go back to your job did you after you left, after you left here yesterday, did you?

A No, I didn't go back to work.

Q You went home didn't you?

A No I didn't go straight home neither.

Q Isn't it a fact that you were trying to avoid

being served with a subpoena again?

A No. If that was the case I wouldn't have been home yesterday evening.

Q But you didn't go directly back to your job for the rest of the afternoon did you?

A No I didn't.

Q Did you see Mr. Brown last night before the F.B.I. came?

A Yeah he was home when I got there.

Q You talked to him about the fact that you had been subpoenaed?

A Yeah I told him that.

Q What did Mr. Brown say about that?

A He said why I didn't go down there.

Q Well you have been in trouble before haven't you with the police Mr. Brown?

A I am not Mr. Brown.

Q I am sorry, my apology, Mr. Webb?

A I have never been in no real trouble. I don't think so, no.

Q But you were afraid yesterday when you didn't comply with that subpoena that you were going to be in trouble, isn't that a fact?

A Well I just didn't want nobody coming to my house.

Q I am sorry.

A I didn't want nobody coming to my house you know.

Q When they came to your house you told them the reason you didn't come here to Court, isn't that right?

A Yes I told them.

Q Isn't it a fact that Mr. Rucker told you that for testifying you would get paid the normal witness fee for testifying?

A No, that is not what he told me.

Q On the statement that was made, allegedly by Mr. Rucker yesterday, you didn't tell anybody about it yesterday did you, prior to the F.B.I. coming to your house in the evening?

A No I don't think so.

Q You didn't come into Court with the subpoena and tell the Judge or the District Attorney or the F.B.I. about this statement did you?

A I told Danny that I didn't want to have nothing to do with it.

Q Isn't it a fact sir that at one time you were in the presence of Mr. Rucker and Mr. Brown and Mr. Brown admitted to you that the only reason he was testifying was to get back at Danny for a burglary?

A No no.

Q Did you ever hear that Mr. Brown's house was burglarized?

A Yeah I heard about that.

Q Did you hear that Mr. Brown claimed it was Mr. Rucker and Mr. Smith that did it?

A No he didn't tell me that.

Q Had you heard that that was the word in the neighborhood?

A That was the word yes.

Q You don't want your friend Mr. Brown to go to jail do you?

A Like whoever commits crimes that is them. I have nothing to do with that.

Q Is Mr. Brown paying you rent?

A Yes.

Q How much rent is he paying?

A Thirty dollars a week whenever he works you know.

Q Is he working now?

A No.

Q He is not paying you any money now is he?

A No.

Q But he is still staying with you?

A Yes.

Q He is a good friend of yours?

A Well yes he is a good friend.

Q Does anyone else live in the house with you
and Mr. Brown?

A My wife and four kids.

Q Anybody else?

A That is all.

MR. LARIMER: I have nothing further.

MR. WOLFORD: No questions.

THE COURT: You may step down.

MR. WELCH: The Government calls Robert
Darmer.

R O B E R T D A R M E R was called as a witness
after having been first duly sworn by the Clerk of
the Court, testified as follows:

DIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Darmer, will you raise that microphone so
you could talk right into it please. How are you employed

--

A I work for the State Office of Drug Service
as a Narcotics Parole Officer --

Q You have to slow down please how are you

employed?

A A narcotics parole officer with the State Office of Drug Abuse Services.

Q Where were you so employed on September 29, 1976?

A In Rochester.

Q Do you know Eugene Smith?

A I do.

Q Do you see him in the Courtroom today?

A Yes I do.

Q Would you identify him to the ladies and gentlemen of the jury.

A He is the gentleman sitting to the far right of the table over there.

Q What color shirt does he have on?

A A sort of pinkish brown.

MR. WELCH: May the record reflect he has identified Eugene Smith your Honor.

THE COURT: Yes.

Q Did you know Eugene Smith in September of 1976?

A I did.

Q What was your relationship with Eugene Smith in September of 1976?

A I was his supervising narcotic parole officer.

Q What does that mean?

A He was required to report to me on a weekly basis at my office in Rochester. I gave urine tests to see if there was drug usage. I made home visits and in general I just supervised him on a parole type basis.

Q When he came into see you at the office, what was your program? Did you have to ask any questions?

A I would ask him if there was any drug use. I would ask him if he was employed, ask him his efforts toward employment.

Q Did those questions include use of marijuana?

A Yes.

Q Did Mr. Smith come up to see you on September 29, 1976?

A He did not.

Q Was he supposed to.

A He was supposed to report the day before which was Tuesday the 28th. He did not report here either Tuesday or Wednesday.

MR. WELCH: Would you mark this.

THE CLERK: Government's Exhibit 21 marked for identification.

MR. WOLFORD: I assume you are not offering it?

MR. WELCH: Not yet. I will tender it to the Court.

THE COURT: You better let him identify it first.

Q I had you what has just been marked for identification as Exhibit number 21. Would you tell the Court and jury what that is?

A Yes. This is a chronological report which is prepared by our office on a quarterly basis. I also use this as a return to residence of police custody because he was arrested at the time that this was - -

Q Who prepared that particular form?

A I did.

Q Would you look at it carefully. There are two pages there, is that correct?

A Correct.

Q Would you look at the second page please. Was that the second page attached when you prepared the report?

A Yes, we have a carbon which is put in between so that the second page is actually the carbon. The original is turned in with a carbon copy. But this is the original document.

Q How about the third page, without telling us what that is, just tell us was it attached when you prepared

the report?

A To my knowledge it was, yes.

Q Does your signature appear on this report?

A It does.

Q Where does it appear?

A Where it says NAO.

MR. WELCH: I offer that.

MR. WOLFORD: Can we approach the bench?

THE COURT: Yes.

(A side bar discussion.)

MR. WOLFORD: There is no one basis to have that item introduced into evidence. Number one it references in some detail to the arrest of the bank robbery on the back side. Secondly, there is a newspaper clipping dealing with the bank robbery. It is not the best evidence. Whether Mr. Smith was there or not, he has testified that he has taken this as a summary of other records. Now, if your point is to dispute his being there on the 29th you could do that. You have already done that. But to have this introduced, it is totally improper.

MR. WELCH: Well if your Honor pleases, we would be willing to submit in evidence just the front part of the form and the back part of the form that

relates to the question of marijuana use which is very relevant to what the witness said on the stand yesterday.

MR. WOLFORD: He admits his marijuana use.

MR. WELCH: The point is your Honor that he claims he smoked seven reefers just before going to see his probation officer. We claim to ask him about marijuana cigarette smoking.

MR. WOLFORD: The statement on there, I don't see a proper basis for rebuttal. It's not the best evidence that he was not there on the 29th.

THE COURT: Where does it indicate marijuana usage?

MR. WELCH: Over here.

THE COURT: I see.

MR. LARIMER: Can I see the exhibit?

MR. WOLFORD: This was prepared - -

THE COURT: I think he is right. If he challenges the varacity of the September 29th appearance on cross-examination I will not let the first page in because it shows he was not there.

MR. WOLFORD: It is not the best evidence.

THE COURT: Well, that is a record kept untemperanious. If you challenge it I will let it in,

but if it is acceptable the way it is - -

MR. WOLFORD: This your Honor is a document that was prepared that indicates that Mr. Smith was in the Monroe County Jail. Apparently, what Mr. Darmer did is he went to get these other records and prepared this indicating the date of contacts, the dates of visits, the dates of unexcused absences, what happened to be inconsistent.

THE COURT: As I recall the testimony of both the witness and Mr. Smith, it is possible to show that on the 29th he did not show up. He marked the 29th as an unexcused absence.

MR. WOLFORD: He didn't mark it down on this but something else.

THE COURT: I think you are missing the point. He marked it down on a ledger.

MR. WOLFORD: He said this is his aftercare chronological study.

THE COURT: Prepared quarterly. What difference does that make?

MR. WOLFORD: A lot of difference. It is not accurate.

THE COURT: As long as he is required to prepare this in the ordinary course of business it goes

in. You can challenge it. I will allow the first page. The rest of it is probably not admissable.

MR. WELCH: May I also note your Honor that Counselor may indeed attempt to say this witness was preparing this, trying to figure out where Mr. Smith was on the 29th. From the date of the newspaper clipping, the newspaper article has an erroneous date that says that the bank robbery was on September the 23rd and I think if Counselor opens up that question - -

THE COURT: That may well be if he does open it, sure there is no question.

MR. LARIMER: The newspaper article is admissible?

THE COURT: If he uses it it is going to be admissible.

MR. LARIMER: I object to the introduction of the newspaper article.

THE COURT: It is not going in until we see what Mr. Welford does.

MR. LARIMER: I assume you are offering it. I object.

THE COURT: At the moment I sustain it.

(End of side bar discussion.)

Excerpts of Testimony of Robert Darmer.

DIRECT EXAMINATION

BY MR. WELCH:

Q What would you say you are to Mr. Smith, his parole officer?

A Narcotic parole officer.

Q As his Narcotic parole officer, if he came to you after smoking seven reefers would you know that?

A I would.

MR. WOLFORD: I object. I object your Honor.

THE COURT: On what ground?

MR. WOLFORD: Speculation.

THE COURT: How long have you held this position?

THE WITNESS: I held that position for close to seven years around.

THE COURT: How many people would you say you dealt with who had taken or used narcotics in various forms including marijuana?

THE WITNESS: I could only guess it would probably be twenty five hundred to a thousand persons during that period of time.

THE COURT: Your objection is overruled.

Q Would you know if he had smoked seven reefers before coming to see you that day?

A I would know by his actions, yes.

MR. WELCH: I have no further questions your Honor.

THE COURT: Bear in mind that is an opinion ladies and gentlemen. That is an opinion.

CROSS-EXAMINATION

BY MR. WOLFORD:

Q Mr. Darmer, who are you employed with at the present time?

A The New York State Division of Probation.

Q How long did you hold this position as an aftercare officer?

A Approximately seven years. Just short of seven years.

Q Where was your office located sir in September of 1976?

A 10 North Sitz (phon.) Street, Rochester.

(Continued on next page.)

* * * * *

Excerpts of Testimony of Robert Darmer.

Q I have no further questions.

REDIRECT EXAMINATION

BY MR. WELCH:

Q Mr. Darmer, just so we understand, did Eugene Smith come in on September 28th or September 29th?

A He did not.

Q Did you record on this report all the days he did come in?

A Yes, I did.

Q I would like you to look at this report. Now, was that prepared because he was arrested on this charge or was that the quarterly report?

A That was prepared because of the arrest, as well as we do this for the quarterly report simultaneous. I wrote the same report to cover both situations, as is noted by the two actions on top for the reason.

MR. WELCH: May we approach the bench, your Honor?

THE COURT: Yes.

(Side bar discussion.)

MR. WELCH: I think Mr. Wolford might have opened the door.

THE COURT: Let me see the report.

MR. WELCH: The Court could instruct him not

to argue that he prepared that stating it's the 29th because he knew the bankrobbery was the 29th because in fact he didn't know it was the 29th.

THE COURT: I will allow the first page in, just the first page.

MR. WOLFORD: That is objectionable.

THE COURT: What is objectionable?

MR. WOLFORD: It is not the best evidence.

THE COURT: Your objection is overruled.

MR. WOLFORD: It is prejudicial.

THE COURT: You can blot that word out if you want.

MR. WOLFORD: What will be accomplished?

THE COURT: It goes in, except for those two --

MR. WOLFORD: You are saying the front page?

THE COURT: Yes, the front page.

MR. WELCH: Subject to your Honor's ruling, I offer Exhibit 21.

THE COURT: All right, Exhibit 21, the face page of 21 will be received.

(End of side bar discussion.)

THE CLERK: Government's Exhibit 21 marked in evidence.

MR. WELCH: May I read the contents and the

Excerpts of Testimony of Robert Darmer.

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reporting date to the jury?

THE COURT: Yes.

MR. WELCH: "Context date of office visits with client 9/3, 7/14, 22nd, 10/19, 26, 11/23. Dates of field visits to home of client: Check if client or immediate family contacted. Checkmark 9/2, checkmark 10/25, checkmark 11/24. Reporting record: Dates of unexcused failure to report: 9/29, 10/5, 12/11, 9/16. Total six."

I have no further questions, your Honor.

RE CROSS-EXAMINATION

BY MR. WOLFORD:

Q Mr. Darmer, the records you used to prepare are located where, sir?

A That would be in the file. The field book records would be in the file for Mr. Smith, in the Office of Drug Services in the Rochester Office. The original of the daily activities sheet, I believe, was sent to Buffalo. I don't know where it went from there. The carbon copy is in my possession of the daily activity.

Q When you say daily activity, what do you mean by that?

A Every day we fill out a sheet listing all contacts and all activities which were turned into the

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you sum up?

MR. WELCH: I would like to show it to the jury before I sum up, your Honor. What is your Honor's practice in regard to exhibits? Do you send them in when they deliberate?

THE COURT: If you wish, I usually say if you ask for such exhibits as you want --

MR. WELCH: That is acceptable.

THE COURT: You can show it to them without the part that has to be redacted and you can take this to the jury.

MR. WELCH: Thank you.

MR. LARIMER: Your Honor, I don't anticipate being much longer than a half an hour. I didn't realize that I committed myself to that yesterday.

THE COURT: I am not committing anybody to anything. I am telling you the target I am shooting for.

MR. WOLFORD: Can I make a thirty-second visit across the hall?

THE COURT: Yes. Mr. Welch, on your request for suppression, with respect to suppressing the fabrication of evidence, what specifically do you have in mind, apart from Mr. Darmer's testimony?

MR. WELCH: Mr. Darmer's testimony and Mr. Webb's testimony, your Honor. May I see the defendant's exhibits?

MR. LARIMER: Where is that request?

THE COURT: Is the correct charge you may consider evidence of such an attempt in determining guilt or innocence or in determining consciousness of guilt or innocence? Well, it is supposed to be consciousness of guilt or innocence.

MR. WELCH: That is why I suggested to your Honor that you use it more as a checklist of the kinds of things we are requesting, because I have not had a chance to read these since they were prepared for me last night.

THE COURT: In determining possible consciousness of guilt, I am going to say -- I am not going to talk about determining guilt or innocence, because in United States v. DiStefano, to be specific, about six months ago the Second Circuit reversed it even though there was no objection by the defendant. And I asked the defendant's counsel afterward if he would have preferred to have determined consciousness of guilt and he said no. But they reversed it, anyway.

MR. LARIMER: So there would be no reference in this charge to that type of --

THE COURT: No, no. It's admissible with respect to consciousness of guilt. It's not admissible with respect to the determination of guilt.

MR. LARIMER: I don't think there has been any evidence of fabrication or suppression of evidence in chief.

MR. WOLFORD: I think a charge should be appropriate to the evidence. I am unaware, as far as Smith and Rucker, that there has been any testimony of fabrication or suppression.

THE COURT: Where have you been in the last few days?

MR. LARIMER: I agree with Mr. Wolford.

THE COURT: Okay. Bring in the jury. I understand your position.

MR. LARIMER: The Court is overruling our objection to that?

THE COURT: Yes.

MR. LARIMER: Does the Court intend to instruct as the Government has requested?

THE COURT: No, I am not going to use all of this.

MR. LARIMER: Could we have a moment to review it?

THE COURT: Yes, you can review it the same as

Excerpts of Summation of Mr. Welch.

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I will review it, but we will get the jury in and conduct the summations. Let's get the jury in.

(Jury enters courtroom.)

THE COURT: Ladies and gentlemen, we are going to have summations by counsel in the case. I told you at the beginning of the case, and I maybe even said it once or twice at the close of the case, but I reiterate that the statements of counsel are not evidence of any kind. You have heard the evidence. You have heard the testimony from the witness stand and you have seen some of the exhibits and you will be entitled to see all the exhibits which have been marked into evidence. The summations are guides or summaries or arguments to bring to you of what the attorneys think they have proved in the course of the trial.

All right, Mr. Welch.

MR. WELCH: Thank you, your Honor.

Ladies and gentlemen, the evidence in this case proves beyond a reasonable doubt that these defendants caused the other people to enter these banks with intent to rob them. That is our burden of proof beyond a reasonable doubt. Listen to his Honor's instruction on this point. Though it is not beyond all doubt, it is not mathematical certainty,

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Excerpts of Summation of Mr. Welch.

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On September 17th, he contacted Jackson. On September 18th, the first contact by the Rochester police department with Bob Rivera probably by Jackson's lead. That is an inference you can draw. Well, no, I expect it is going to be argued that is part of the great conspiracy to get these people. If Jackson was going to lie because Rucker and his brother stabbed him, if he was going to lie because Rucker and his brother stabbed him, why didn't he say Rucker and his brother were involved in the bankrobbery? He didn't. He just said Danny Rucker was involved in the bankrobbery. So, if he was lying to get back at them, wouldn't he have said that both of them were involved? He said what he knew. He said it, he told them, he blew the whistle on them because he didn't like them any more, but he did tell the truth.

Now, I am sure that Mr. Wolford, you heard him opening and my opening statement, and I am sure he is going to get up here and tell you ladies and gentlemen, that the Government is trying to convict my client, Eugene Smith, by running him together with Danny Rucker. And you have got to separate them out and decide the facts on Eugene Smith. And he is

Excerpts of Summation of Mr. Welch.

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right. And I want you to do that. But look at the facts on Eugene Smith. You have got Biggs, Brown. He says that Eugene Smith came over to get me that morning. Of course, Eugene Smith said yeah, I did go get him that morning. Of course, he admitted it because he knew that Ms. Brown saw Gene Smith come to Brown's house that morning. So he certainly does not want to deny that he saw them. Biggs, Brown, the guy who told you he does not like to mess with guns, sure he has been with other people in armed robberies, and he didn't hide them from you, he admitted that freely. Gene Smith tried to get him a gun. Take this gun. Remember, he first went to Danny Rucker's house, then back over to Gene Smith's house. He pulls a gun, a sawed-off gun and he wants him to take it in to rob the bank.

Who wrote the demand note? Well, he could have said if he was out to hang Gene Smith, he could have said Gene Smith wrote the demand note, period. But he said it didn't really happen quite like that. Danny Rucker started to write a note, but then that got changed somehow or another. I don't recall the testimony exactly. But Danny Rucker then began to explain the layout of the bank and Gene Smith wrote

* * * * *

Desmond Hall is lying to you.

Now, ladies and gentlemen, you heard the Court's limiting instructions on this exhibit, Exhibit 20 in evidence. You heard the Judge tell you about if you find the other acts have been proven, does that show Danny Rucker's intent, preparation, plan, knowledge, identity?

First of all, it is the same bank. Nora Cameron came here to testify she was robbed on the 15th of January. Her name is mentioned as the victim on the indictment to which Mr. Rucker entered a plea to a reduced charge. Mr. Rucker, of course, in his statement, said that it was the Marine Midland Bank on Hudson Avenue, the same bank as January 15, 1976. The testimony is that in May of 1976 they go back to that bank twice. Then on May 3, 1976 he enters a guilty plea to a reduced charge. And you notice it says on here on May 3, 1976 the District Attorney orally in open court recommended that the defendant be permitted to plead guilty to the crime of grand larceny third degree E felony in the interest of justice. The sentence, probation four years and ten months.

Then, of course, in July that is the sentence

he gets. You got to look at what he pleaded guilty to, the circumstances, look at that statement in there. He is waiting outside the bank while two other people go in with a gun. Does that sound like a plan with a gun he provided? Does that sound like a familiar plan?

One of the robbers has shaded glasses. Does that sound familiar to you?

Then they go back and split up the proceeds by breaking them up into \$100 piles. Does that sound familiar?

Gene Smith had the largest stack.

The May robbery he got Rivera. He has got Rucker's gun and shades, while Rucker waits outside. Brown had Rucker's glasses, and he took what Rucker and Smith wanted to use like a gun. He showed you how he used it. Did it look like a gun to you?

What did Cynthia Miller tell you it looked like? And Desmond Hall sees Rucker there while the Smith brothers are counting up the money in stacks. Nine days before the first attempt in the Marine Midland Bank he pleads guilty. He knows he is going to get probation on that big deal, but they have got his pictures so he cannot go into the bank. Think of the

other plans. Who is outside? Well, while the guys go in and rob the place, Danny Rucker. This conviction obviously shows that the motive is intent. The preparation, his plan, his knowledge is like anything.

There is probably going to be some comment about a bicycle, an abandoned bicycle. A big 250-pound guy or whatever, 260, those were the first questions out of Mr. Wolford's cross-examination of how much do you weigh now, how much did you weigh then?

I can see what is coming. I certainly hope he does not try to tell you it is ludicrous to speak of such a huge man riding away on a woman's ten-speed bicycle. They rode away and got caught. Isn't it perfect in a busy shopping area to get on a ten-speed bicycle right over there, everybody is going to be looking for you. You heard investigator Grossi say everybody is looking for a large Negro, several days growth, red cap, Army jacket riding a bicycle in the busy shopping center or the store, go inside, change clothes, give us the money, they are not going to be looking for us. You can surmise that is what they planned. The bicycle, well if

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Excerpts of Sentencing Proceedings, dated 11-21-77.

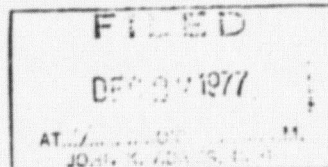
UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- vs -

DANIEL LEE RUCKER and
EUGENE SMITH,

Defendants.



CR: 76-181

SENTENCE

Transcript of proceedings had and testimony taken in
the above-entitled matter, before the HON. THOMAS C. PLATT, JR.,
United States District Judge, in the United States District
Court, Rochester, New York, on Monday, November 21, 1977.

APPEARANCES:

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(By Gerald J. Houlihan, Esq.)
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Rochester, New York 14614

Appearing on behalf of the Government

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Appearing on behalf of Defendant
Daniel Lee Rucker

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Appearing on behalf of Defendant
Eugene Smith

Excerpts of Sentencing Proceedings, dated 11-21-77.

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Rochester, New York

Monday, November 21, 1977

- - -

THE COURT: I will hear your motions first.

Do you want to address the Court?

MR. LARIMER: Yes, Your Honor.

Your Honor, at this time, although we did move shortly after the jury verdict for a judgment of acquittal, the Court did suggest that we make those at a later time. I have so done, and I would move at this time for a judgment of acquittal, or in the alternative for a new trial for the reasons stated in my motion, principally that the testimony of the two witnesses who testified against Mr. Rucker and Mr. Smith, being Mr. Roberto Rivera and Edward Brown, that their testimony was so incredible and so inconsistent that as a matter of law the Court should not have allowed the jury to consider that testimony.

Also, as we discussed several times at the trial, as to Count 1 of the Indictment

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against Mr. Rucker, that there simply was no evidence that the individual Roberto Rivera, who entered the bank, had any intent to commit any felonious act whatsoever in that bank. And it is my position that failing to prove that that participant had any intent, the jury could not convict Mr. Rucker of having a requisite intent to rob the bank in question in Count 1.

As part of my motion in the alternative for a new trial, I have mentioned, in our view, the incredibly inconsistent testimony of the two principal Government witnesses and also their obvious interest in seeing Mr. Rucker and Mr. Smith convicted.

I also feel that in the circumstances of this case, the allowance of a witness, Frederick Webb, to testify in rebuttal, was error and of the most prejudicial kind.

Based on that, and also based on the Court's allowance into evidence of a prior conviction for robbery of Mr. Rucker was of such a nature to be so prejudicial that the jury simply could not separate the evidentiary

Excerpts of Sentencing Proceedings, dated 11-21-77.

reason that testimony was introduced, and I feel convicted Mr. Rucker simply on the basis of his prior involvement in a robbery.

THE COURT: Refresh my recollection, if you will, and for the record, with respect to the testimony of Mr. Webb.

MR. LARIMER: It is my recollection that Mr. Webb was called by the Government in rebuttal to testify in sum and substance that Mr. Rucker approached him during the trial and offered him some sum of money, and I believe it was four hundred dollars, if he would testify a certain way on behalf of Mr. Rucker.

You will recall he was cross-examined by me about his fear of being in trouble for not complying with the subpoena that I had issued, and there was some discussion through cross examination that he might have been told that he would have received a witness fee for testifying. But I think that that was improper rebuttal testimony, if I have properly summarized it, and that is my recollection of what the testimony was.

THE COURT: Improper rebuttal testimony? In what sense?

MR. LARIMER: In the sense that it was offered to rebut nothing which the defense introduced in their case. That is the sole basis that I understand rebuttal testimony, to rebut something specifically brought out by the defense.

THE COURT: The defendant had taken the stand by that time and had denied participation. It certainly would go to the question of his consciousness of guilt if the jury believed the testimony, wouldn't it?

MR. LARIMER: I don't believe so. This was the Court's position when I brought it up before.

THE COURT: All right.

MR. LARIMER: I have nothing further, Your Honor, as to the motion for judgment of acquittal or for a new trial.

THE COURT: I think I ruled on the legal questions that you raised during the course of the trial. And, of course, I think the factual questions you raised were left up to the jury, and the jury found against your client, so I'm afraid I have to deny your motion.

MR. LARIMER: Is the Court also denying

Excerpts of Sentencing Proceedings, dated 11-21-77.

my motion for a new trial?

THE COURT: Yes.

MR. WOLFORD: May it please the Court, I submitted a motion for a judgment of acquittal or for a new trial, dated November 15th. I sent it to you --

THE COURT: I received it. I read both your motion earlier and, of course, I read Mr. Larimer's before coming in here this afternoon.

MR. WOLFORD: I will be very brief, Your Honor. My main point for a judgment of acquittal relates particularly to the testimony of Mr. Brown. Not only was it repeatedly inconsistent, but more importantly with respect to the defendant Smith, there was not, in my view, any corroborating evidence to establish the claim of Mr. Brown with respect to the involvement of Mr. Smith. In particular, my view of this case, if being tried in State court, would not have even been allowed to go to the jury with respect to the defendant Smith. Unfortunately, the rules in Federal Court don't have those safeguards with respect to accomplice testimony, and as a result, I realize it can be submitted solely for the jury's determination.

Excerpts of Sentencing Proceedings, dated 11-21-77.

However, Your Honor, I think in view of the requirement, at least in State court, of some corroborating evidence of an accomplice, in the absence of any corroborating evidence, but more importantly, the inconsistencies throughout, that this case should not be allowed to be submitted to the jury with respect to the defendant Smith.

On that basis, I would ask for a judgment of acquittal.

As far as a new trial request, Your Honor, I think the primary point is, as I have pointed out in our motion papers, as far as the error that occurred here, it is with respect to the failure of the Court to allow a severance of the Counts of the Indictment in order for the defendant Smith to be tried only with respect to the Counts relating to the bank robbery in September of 1976.

I appreciate the fact that I didn't move prior to the commencement of trial for that severance. On the other hand, it was not until the day before the trial that I was made aware of the fact that the Government intended to

Excerpts of Sentencing Proceedings, dated 11-21-77.

prove that the defendant Rucker had been convicted previously of another bank robbery.

Just as important is the fact that the Government intended in this trial to introduce a previously signed confession from the defendant Rucker. Prior to that date, we were never advised that this particular type of proof was going to be presented. Despite the fact that the Court ruled that it was untimely for me to move for a severance, I submit that the circumstances changed and as a result, it was timely and it should have been granted.

And I believe that the evidence speaks for itself as far as the prejudicial effect of having defendant Smith proceed to trial with the defendant Rucker. On that basis, Your Honor, I ask that the Court grant the defendant Smith's motion for a new trial, or in the alternative, for a judgment of acquittal, or the other way around, rather.

Thank you.

THE COURT: Let me comment on the last part of your motion first. I think you are correct that one of the grounds that I denied your motion initially was that it was untimely.

I'm not so sure that that was the only ground. I thought I indicated to you at the time that the matter could be covered by a cautionary instruction to the jury, which I am reasonably confident I covered with the jury, I think both during the trial and at the conclusion of the trial. If I did it inadequately, I'm sure you will point it out to the Court of Appeals. But I thought I made it clear that the matters pertaining to Mr. Rucker pertained to him and pertained to him only and were not to be used against your client. I think I covered it adequately. I think that this jury was a discerning jury, and I think that they understood what was to be used against one defendant and not used against another.

Without more at this point, I think I can say that I don't think there was any prejudice, and I think even if I was wrong on the timeliness motion, I think your client was fully protected by what went on during the course of the trial. That's not to say that I think you were timely by any means. But I say even if I was wrong on that question, on the inconsistencies and so forth, I think those are questions of

Excerpts of Sentencing Proceedings, dated 11-21-77.

fact, Mr. Wolford, that the jury had to contend with and they found, I think, after both very able summations and very able cross examination by both you and Mr. Larimer, they found against your clients.

Those are questions of fact, and while the testimony in some respects with respect to both defendants was uncorroborated, and I say "in some respects" advisedly, because there was corroboration on various aspects of the problem. While there was some uncorroborated portions of the evidence in the Federal Court, as you have rightly pointed out, that is a question for the jury. If the jury believes the uncorroborated evidence beyond a reasonable doubt, it is sufficient. So I'm afraid I must deny your motion.

Mr. Larimer, given that state of facts, is there any legal reason why we shouldn't proceed with sentencing?

MR. LARIMER: Well, I do have some comments on the probation report, Your Honor, some of the information in there, but other than that, I see none.

THE COURT: Let's take your comments, and I will see if I have given them any undo weight,

* * * * *

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United States Attorney

Attorney(s) for **Plaintiff-Appellee**

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Attorney for Defendant-Appellant,
Daniel Lee Rucker
240 Reynolds Arcade Building
Rochester, New York 14614

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Sworn to before me this **27th** day of **April, 1978.**

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Notary Public

Commissioner of Deeds

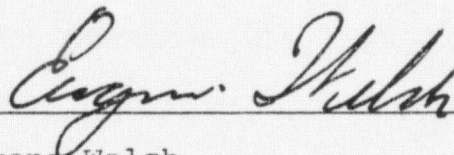
cc: **Richard J. Arcara, Esq.**
United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	DOCKET NOS.
	:	77-1478
Plaintiff-Appellee	:	77-1479
- vs -	:	
DANIEL LEE RUCKER and EUGENE C. SMITH,	:	
	:	
Defendants-Appellants	:	
	:	

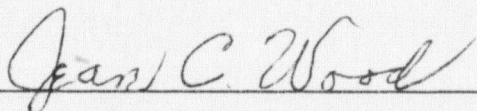
AFFIDAVIT OF SERVICE

Eugene Welch, being duly sworn, deposes and says that or April 28, 1978 he did cause to be mailed in a securely wrapped postpaid wrapper by first class mail one copy of the Appendix for Appellee, United States of America, of the above-entitled case, addressed to Michael R. Wolford, Esq., Lincoln First Tower, Rochester, New York 14604.



Eugene Welch
Assistant United States Attorney

Sworn to before me this 28th day
of April, 1978.



Jean C. Wood
Notary Public. County of Monroe.
State of New York.
My Commission expires 3-30-80.